Supreme Court, U.S.
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In The

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Supreme Court of the United States

WELDON LACKEY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE and MIKE JOHANNS, in his official capacity as Secretary of the United States Department of Agriculture,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

The 1938 Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1524 ("FCIA") is essentially the only program through which farmers across the nation can insure their crops against damage from weather and pestilence. However, farmers are frequently confronted with a maze of conflicting regulations and actions by the Federal Crop Insurance Corporation ("FCIC") and federally-backed insurers which effectively "runs out the clock" on the farmers' crop insurance coverage. Under the pertinent regulations, farmers are required to mediate or arbitrate their ensuing disputes with their insurers. If the dispute "in any way" involves an FCIC policy or procedure interpretation, the farmers are required to obtain an interpretation from FCIC in accordance with certain regulations that require the FCIC to respond promptly. If a farmer fails to obtain an interpretation from the FCIC, any agreement or award against the insurer is automatically void. When, as in this case, the FCIC refuses to become involved and fails to provide the required interpretation, the farmer is left without insurance.

THE QUESTIONS PRESENTED FOR REVIEW – Continued

The issues presented for review are:

I. UNDER 7 C.F.R. § 400.768, IF A FARMER SUBMITS A REQUEST FOR A FINAL AGENCY DECISION ("FAD"), MUST THE FCIC EITHER: 1) RESPOND WITHIN 90 DAYS; OR 2) NOTIFY THE FARMER WITHIN 30 DAYS IF THE FARMER'S REQUEST IS UNCLEAR, AMBIGUOUS, OR INCOMPLETE?

II. IF THE FCIC FAILS TO SO RESPOND, MAY THE FARMER ASSUME THE INTERPRETATION HE HAS PROVIDED IS CORRECT FOR THE APPLICABLE CROP YEAR UNDER 7 C.F.R. § 400.768(e)?

III. WHETHER A RESPONSE BY THE FCIC DECLINING THE FARMER'S REQUEST FOR AN FAD, AND INSTEAD ADVISING THE FARMER TO ARBITRATE HIS DISPUTE WITH THE FEDERAL CROP INSURER, IS A SUFFICIENT "RESPONSE" BY THE FCIC UNDER 7 C.F.R. § 400.768.

LIST OF ALL PARTIES TO THE PROCEEDING

All parties are revealed in the Caption of this Petition. The actions of the FCIC and the United States Department of Agriculture's Risk Management Agency ("RMA"), which administers all crop insurance programs for the FCIC, are at issue in this case, and the approved insurance provider in this case is ARMtech Insurance Services.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The United States Department of Agriculture determined that a farmer is not entitled to rely on his interpretation of USDA policy during the applicable crop season if he requests a final agency determination from the USDA's Risk Management Agency, and the Risk Management Agency fails to provide one within 90 days and fails to notify the farmer that his request is unclear, ambiguous, or incomplete as required under the applicable Regulation. (App. 49-63). Instead, the USDA determined that as long as the Risk Management Agency "responds" to the farmer's request by acknowledging the request's existence, the Risk Management Agency can indefinitely postpone the regulatory deadlines. (App. 49-63). The Magistrate's Report and Recommendation (App. 25-31) affirmed this determination, the District of New Mexico (App. 23-24) adopted the Report and Recommendation, and the Tenth Circuit's Order and Judgment (App. 1-22) affirmed the District Court's order.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(i) Neither party sought rehearing.

(ii) Jurisdiction in this Court exists under 28 U.S.C. § 1254(1). Petitioner seeks a writ of certiorari granted upon his petition as a party to a civil case after

rendition of judgment by the United States Court of Appeals for the Tenth Circuit.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (2005).

General Powers

. . .

Procedures for responding to certain inquiries

(1) Procedures required

> The [FCIC] shall establish procedures under which the [FCIC] will provide a final agency determination in response to an inquiry regarding the interpretation by the [FCIC] of this chapter or any regulation issued under this chapter.

(2) Implementation

> Not later than 180 days after June 23, 1998, the [FCIC] shall issue regulations to implement this subsection. At a minimum, the regulations shall establish –

(A) the manner in which inquiries described in paragraph (1) are required to be submitted to the [FCIC]; and

(B) a reasonable maximum number of days within which the [FCIC] will respond to all inquiries.

(3) Effect of failure to timely respond

If the [FCIC] fails to respond to an inquiry in accordance with the procedures established pursuant to this subsection, the person requesting the interpretation of this chapter or regulation may assume the interpretation is correct for the applicable reinsurance year.

7 U.S.C. § 1506(r) (2005)

FCIC obligations.

(a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement.

(b) If, in the sole judgment of FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will notify the requester that the request is unclear, ambiguous or incomplete, within 30 days of such request.

(c) FCIC will provide a final determination of the interpretation to a request that meets

all the conditions stated herein to the requester in writing, and at FCIC's discretion in the format in which it was received, within 90 days of the date of receipt by FCIC.

(d) If a requestor is notified that a request is unclear, ambiguous or incomplete under section 400.768(b), the time to respond will be tolled from the date FCIC notifies the requestor until the date that FCIC receives a clear, complete, and unambiguous request.

(e) If a response is not provided within 90 days, the requestor may assume the interpretation provided is correct for the applicable crop year.

7 C.F.R. § 400.768 (2005)

Causes of Loss

The insurance provided is against only unavoidable loss directly caused by specific causes of loss contained in the Crop Provisions. All specified causes of loss, except where the Crop Provisions specifically cover loss of revenue due to a reduced price in the marketplace, must be due to a naturally occurring event. All other causes of loss, including but not limited to the following, are NOT covered:

(a) Negligence, mismanagement, or wrongdoing by you, any member of your family or household, your tenants, or employees;

(b) Failure to follow recognized good farming practices for the insured crop;

. . .

(e) Failure to carry out a good irrigation practice for the insured crop, if applicable; or

(f) Any cause of loss that results in damage that is not evident or would not have been evident during the insurance period, including, but not limited to, damage that only becomes evident after the end of the insurance period unless expressly authorized in the Crop Provisions. Even though we may not inspect the damaged crop until after the end of the insurance period, damage due to insured causes that would have been evident during the insurance period will be covered.

7 C.F.R. § 457.8(b)(12) (2005)

Mediation, Arbitration, Appeal, Reconsideration, & Administrative and Judicial Review

. . .

(1) All disputes involving determinations made by us, except those specified in section 20(d), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must

obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a rule of general applicability and is not appealable. If you disagree with an interpretation of a policy provision by FCIC, you must obtain a Director's review from the National Appeals Division in accordance with 7 CFR 11.6 before obtaining judicial review in accordance with subsection (e).

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

7 C.F.R. § 457.8(b)(20)(a)(1) (2005).

FCIC Policies.

. . .

This is an insurance policy issued by the Federal Crop Insurance Corporation (FCIC), a United States government agency. The provisions of the policy may not be waived or

> modified in any way by us, your insurance agent or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. Procedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at http://www.rma.usda.gov/ or a successor Web site will be used in the administration of this policy, including the adjustment of any loss or claim submitted hereunder.

7 C.F.R. § 457.8(b) (2005).

STATEMENT OF THE CASE

Petitioner, Weldon Lackey, seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit. (App. 1-22). The case originated in the United States District Court for the District of New Mexico. (App. 23-31). The basis for federal jurisdiction in the District Court was under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (an appeal from a decision rendered by the United States Department of Agriculture). (App. 25). The District Court entered an Order on March 28, 2008, adopting the Report and Recommendation of a Magistrate Judge entered on February 21, 2008. (App. 23-24). Petitioner filed a timely notice of appeal to the Tenth Circuit on May 21, 2008. Appellate jurisdiction was based on 28 U.S.C. § 1291.

Prior to 1938, crop insurance was virtually unavailable because insurance companies determined that multiple peril crop insurance posed too great a financial risk. Congress remedied this problem by enacting the 1938 Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1524. The Act was designed to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." 7 U.S.C. § 1502(a). (*See generally* App. 26 ¶2).

Congress created the Federal Crop Insurance Corporation ("FCIC"), which acts as an "agency of and within the Department [of Agriculture]" to administer the Act. 7 U.S.C. § 1503. Congress also created the Risk Management Agency ("RMA") to supervise the FCIC and administer all programs authorized under the FCIA. 7 U.S.C. § 6933(a), (b)(1)-(3); 7 C.F.R. § 400.701. The RMA is headed by an Administrator appointed by the Secretary of Agriculture and who "also serve[s] as manager of the [FCIC]." 7 U.S.C. § 6933(c).[1]

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[1] The FCIC's website states that it "promotes the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance. Management is vested in a Board of Directors, subject to the general supervision of the Secretary of Agriculture. . . . The corporation takes actions necessary to improve the actuarial soundness of Federal multiperil crop insurance coverage, and apply the system to all

(Continued on following page)

The Act empowers the FCIC to provide crop insurance directly to farmers or provide reinsurance "to the maximum extent practicable" to private entities providing such insurance. 7 U.S.C. § 1508(a)(1) & (k). The FCIC provides insurance to farmers by (1) selling insurance through private insurance agents; (2) reinsuring private insurance companies who provide crop insurance; or (3) directly providing crop insurance to farmers. 7 U.S.C. §§ 1507 & 1508. *See generally* App. 26 ¶2; *Owen v. Crop Hail Mgmt.*, 841 F. Supp. 297, 300-301 (W.D. Mo. 1994). The form and terms of all multiperil crop insurance policies are dictated by federal regulation, 7 C.F.R. § 457.8(b), so the contents of the policies track the language of the federal regulation.

Petitioner is a cotton farmer in eastern New Mexico. (App. 65). In order to protect himself and his livelihood, and to prevent the inherent financial distress that plagues the agricultural community, Mr. Lackey purchased multi-peril crop insurance for his 2005 cotton crop from ARMtech Insurance Services ("ARMtech"). (*See* App. 88). Mr. Lackey's policy with ARMtech was reinsured by the FCIC and operated and managed by the RMA under 7 U.S.C. § 1508(a)(1) & (k). The provisions and terms of Mr. Lackey's policy are entirely specified by 7 C.F.R. § 457.8(b).

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insured producers in a fair and consistent manner." http://www.rma.usda.gov/fcic. For a history of the Crop Insurance Program, *see* http://www.rma.usda.gov/aboutrma/what/history.html.

Mr. Lackey suffered two injuries to his 2005 crop, from disease and hail. (App. 88). On June 7, 2005, Mr. Lackey called in a claim for both damaging events to ARMtech for this damage. (App. 68 ¶4, 88). Mr. Lackey's policy covered him for "damage" or "loss" to an insured crop. *See*, *e.g.*, 7 C.F.R. § 457.8(b)(1) ("Claim for Indemnity," "Coverage," "Damage," "Insurable Loss"). Disease is not an excluded cause of loss or damage under the policy. *See* 7 C.F.R. § 457.8(b)(12). The question then became how to adjust for a loss due to disease.

ARMtech's adjusters offered two methods to adjust the crop that had been damaged by *both* hail and disease. The first was an "eyeball" method whereby the adjuster simply pulled up and discarded green leafed plants that he did not consider "viable." (App. 88). Mr. Lackey claimed those plants were diseased and that there should be an adjustment for their loss,[2] so he did not agree with that method and requested another adjuster. (App. 88). The second method, proposed by the new adjuster, was to have Mr. Lackey raise the diseased crop to maturity and adjust the loss at the time of harvest based on lost production. (App. 88). Mr. Lackey did not agree with that because this effectively forced him to "pour money into a dry hole" by raising a diseased and damaged crop to maturity. (App. 90-91).

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[2] The disease was a fungus (which is microscopic) (App. 68 ¶2) so Mr. Lackey objected to the adjuster simply pulling green leafed plants and discarding them.

In other words (and contrary to the very essence of insurance), instead of receiving insurance proceeds for the loss *already* incurred, Mr. Lackey would have to continue to invest money – perhaps hundreds of thousands of dollars in a large scale crop such as this one – into raising the damaged and diseased crop until it reached maturity. A famer would normally abandon a diseased and damaged crop. But the pertinent regulation and the insurance policy state that

> The insurance provided is against only *unavoidable loss directly caused by specific causes of loss* contained in the Crop Provisions. All specified causes of loss, except where the Crop Provisions specifically cover loss of revenue due to a reduced price in the marketplace, *must be due to a naturally occurring event. All other causes of loss, including but not limited to the following, are NOT covered*:
>
> (a) *Negligence, mismanagement, or wrongdoing* by you, any member of your family or household, your tenants, or employees;
>
> (b) *Failure to follow recognized good farming practices for the insured crop*;
>
> . . .
>
> (e) *Failure to carry out a good irrigation practice for the insured crop*, if applicable; or
>
> (f) Any cause of loss that results in damage that is not evident or would not have been evident during the insurance period, including, but not limited to, damage that only

> becomes evident after the end of the insurance period unless expressly authorized in the Crop Provisions. Even though we may not inspect the damaged crop until after the end of the insurance period, damage due to insured causes that would have been evident during the insurance period will be covered.

7 C.F.R. § 457.8(b)(12) (emphasis added). This presented Mr. Lackey with a "Hobson's Choice": 1) either abandon the crop in which case he risked receiving no insurance for permitting the crop to fail, *see, e.g., id.*; or 2) invest *extra* money into a *diseased* crop (not a *healthy* one) to keep it alive until maturity, at which time the "loss" would only be the difference between what the crop should have yielded and what it actually yielded – not the additional cost of keeping the *diseased* crop alive until maturity.[3]

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[3] Keeping a diseased crop alive can be much more expensive than keeping a healthy crop alive. If a person owns a race horse and insures it for diminished value due to disease, and if the horse becomes afflicted with a degenerative disease, is the person entitled to recover the difference between the horse in its healthy condition less its value in the current diseased condition, or does the person have to inject capital into treating the horse to keep it alive until it eventually dies, at which time the insurer will determine the value of the horse in its healthy condition less the value of the horse at the time of its death? The later situation forces (but does not provide any compensation to) the owner to incur the additional veterinary and other expenses to keep the horse alive. Mr. Lackey requested, but never received, the RMA's *policy* articulation on this issue.

Mr. Lackey desired to mediate his dispute (App. 65), but he needed clarification on two things: 1) whether the *procedure* for resolving the adjustment issue was provided on page 16 of the United States Department of Agriculture's ("USDA") Cotton Loss Adjustment Standards manual (the "Handbook" found in pertinent part at App. 92-97) (*see* App. 89)[4]; and 2) whether it was the RMA's *policy* under the *regulation*, 7 C.F.R. § 457.8(b) and the corresponding insurance *policy* to allow him to abandon the diseased crop, or to require him to finance it to maturity.

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[4] The federal regulations, and the corresponding provisions in Mr. Lackey's insurance policy promulgated thereunder, stated:

> This is an insurance policy issued by the Federal Crop Insurance Corporation (FCIC), a United States government agency. The provisions of the policy may not be waived or modified in any way by us, your insurance agent or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. *Procedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at http://www.rma.usda.gov/ or a successor Web site will be used in the administration of this policy, including the adjustment of any loss or claim submitted hereunder.*

7 C.F.R. § 457.8(b) (emphasis added). The Handbook on which Mr. Lackey relied is issued by the FCIC and is published on the RMA's website, http://www.rma.usda.gov/data/25000/2005.html, and is thus used "in the administration of [Mr. Lackey's] policy, including the adjustment of any loss or claim submitted [t]hereunder." *Id.*

The terms of *both* the Regulation and the Policy required Mr. Lackey to mediate or arbitrate his dispute with one notable exception:

> (1) All disputes involving determinations made by us, except those specified in section 20(d), are subject to mediation or arbitration. *However, **if the dispute in any way involves a policy or procedure interpretation**, regarding **whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure**, either **you** or we **must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X** or such other procedures as established by FCIC.*
>
> (i) *Any interpretation by FCIC **will be binding** in any mediation or arbitration.*
>
> (ii) *Failure to obtain any required interpretation from FCIC **will result in the nullification of any agreement or award**.*
>
> (iii) An interpretation by FCIC of a ***policy*** provision is considered a rule of general applicability and is not appealable. If you disagree with an interpretation of a ***policy*** provision by FCIC, you must obtain a Director's review from the National Appeals Division in accordance with 7 CFR 11.6 before obtaining judicial

> review in accordance with subsection (e).[5]
>
> (iv) An interpretation by FCIC of a *procedure* may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

7 C.F.R. § 457.8(b)(20)(a)(1) (emphasis added). Consequently, as a prerequisite to engaging in mandatory mediation or arbitration, Mr. Lackey was required to obtain an interpretation from FCIC on both his policy issue (*i.e.*, whether he could abandon the crop) and his procedural issue (*i.e.*, how to adjust the loss) in accordance with 7 C.F.R. part 400, subpart X, which states in pertinent part:

> **FCIC obligations.**
>
> (a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement.
>
> (b) If, in the sole judgment of FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will notify the requester that the request is unclear, ambiguous or incomplete, within 30 days of such request.

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[5] Effective April 29, 2010, certain changes were made to this Subsection of the Regulation, but they are not material to this dispute.

> (c) FCIC will provide a final determination of the interpretation to a request that meets all the conditions stated herein to the requester in writing, and at FCIC's discretion in the format in which it was received, within 90 days of the date of receipt by FCIC.
>
> (d) If a requestor is notified that a request is unclear, ambiguous or incomplete under section 400.768(b), the time to respond will be tolled from the date FCIC notifies the requestor until the date that FCIC receives a clear, complete, and unambiguous request.
>
> (e) If a response is not provided within 90 days, the requestor may assume the interpretation provided is correct for the applicable crop year.

7 C.F.R. § 400.768 (2005).

As the 2005 cotton crop year progressed, Mr. Lackey tried on numerous occasions to do what both the Regulation and the Policy required: to obtain an FAD from the RMA that included both a *policy* interpretation and a *procedure* interpretation. Consequently, on July 10, 2005, Mr. Lackey provided the RMA regional office with proof from the New Mexico State University Plant Diagnostic Clinic that identified the presence of vercillium wilt, which is "a serious disease on cotton, especially in the Southwestern U.S." (App. 88-89).

On that same date, Mr. Lackey sent a written request to RMA for a final agency determination ("FAD") seeking an interpretation of certain FCIC

policies and procedures, and setting forth his interpretation of relevant policies and procedures. (App. 87-91; *see also* App. 68 ¶2). Specifically, Mr. Lackey requested RMA to issue the following interpretations:

> a. That the *procedures* of the Handbook apply to diseased cotton crops;
>
> b. That no *policy* allows FCIC to increase a farmer's risk in diseased cotton.

Regarding the policy issue, Mr. Lackey explained his predicament as follows:

> Coincidentally, [the insurance adjusters'] argument is the same as mine, except for the opposing resolutions. Their position is that no one, not even experts, can accurately predict yield of diseased plants, therefore they want to go to harvest for accurate yields. Ironically, I too believe that no one, not even experts, can accurately predict yield of diseased plants, therefore first, since I have proof of diseased plants that qualify for specific cause of loss, I should not have my risk increased by the additional farm operating costs from claim date forward. Second since neither I, nor anyone else, can definitively know if diseased plants will fully recover for a normal yield, I should not have to be forced by RMA and ARMtech to take a chance on any unit with compromised plants for which I own disease insurance.

> *Please define policy and procedure in this matter.*

(App. 90-91 (emphasis added)).

Over two months later, on September 30, 2005, RMA sent a letter to Mr. Lackey (App. 84-86) claiming "[t]his appears to be a dispute between you and your insurance provider. The [RMA] does not normally get involved in such disputes because your policy provides a mechanism [*i.e.*, mandatory mediation or arbitration] for handling of such matters and RMA does not want to interfere with this process." (App. 84). The letter addressed Mr. Lackey's procedural issue but not his policy issue.

Five days later, on October 5, 2005, Mr. Lackey e-mailed a letter to RMA (App. 79-83) stating "[p]lease be advised that *I continue to request a final agency determination on this matter*" (App. 79 (emphasis added)), and advising that the 90 day time frame under 7 C.F.R. § 400.768(c) ended on October 18, 2005. (App. 79).

On October 17, 2005, RMA sent Mr. Lackey correspondence (App. 76-78) refusing to substantively address his request for an FAD and again addressing his procedural issue. (App. 76-77). The letter acknowledged that the RMA can only provide an interpretation of the Federal Crop Insurance Act or the regulations thereunder. (App. 76). Regarding the procedural issue, the letter advised him that he could seek mediation followed by arbitration if mediation was unsuccessful. (App. 77). The letter did not

address his policy issue. The letter also advised him that "[t]he issues contained in your July 10 letter must be resolved with your insurance provider. *RMA has the authority to interpret FCIC-issued policies and procedures* but cannot intercede in this dispute between you and your insurance provider." (App. 78 (emphasis added)). Because RMA's determination constituted an "adverse decision," Mr. Lackey appealed to the NAD pursuant to 7 U.S.C. § 6992(d), 7 C.F.R. § 457.8(b)(20)(a)(1)(iv), and 7 C.F.R. § 11.1.

The following spring, on April 19, 2006, a Hearing Officer for the USDA's National Appeals Division concluded that RMA was incorrect. (App. 64-75). Specifically, the Hearing Officer held that (a) RMA had a duty to answer Mr. Lackey's request for an FAD, and should not have rejected Mr. Lackey's request for an FAD; and (b) RMA had incorrectly characterized Mr. Lackey's appeal as addressing a factual dispute between Mr. Lackey and ARMtech. (App. 72-74). Significantly, the Hearing Officer recognized the distinction between Mr. Lackey's requests for procedural and policy clarifications. (App. 74). The Hearing Officer remarked that Mr. Lackey's original request was "unclear," that RMA should have notified him of that fact within 30 days of receipt of the request, and that Mr. Lackey should have received 90 days to amend his request under 7 C.F.R. § 400.768(c). (App. 74). The Hearing Officer did not rule on the underlying substantive issue of whether the crop was insured for disease, holding that was a

matter for the RMA and not a Hearing Officer. (App. 74-75).

On May 19, 2006, Mr. Lackey sent a request to the Director of the NAD to review and modify the Appeal Determination pursuant to 7 C.F.R. § 11.9. (*See* App. 49). Mr. Lackey claimed that RMA was misinterpreting the hearing officer's determination because it indicated it was in the process of issuing an FAD. (App. 49-50). Specifically, after the Hearing Officer's Appeal Determination, RMA sent a letter to Mr. Lackey's attorney stating that he failed to provide his interpretation of the relevant policy provisions in his original requests for an FAD. (*See* App. 57). RMA said it would give Mr. Lackey ten days to submit the relevant policy provisions and his interpretations or it would issue its FAD. (*See* App. 57). Mr. Lackey contended that RMA did not get a "second bite at the apple" if it considered his original requests unclear, ambiguous, or incomplete. (*See* App. 58). Instead, he contended that his requests for an FAD were plain,[6] so under 7 C.F.R. § 400.768(b) the RMA had 30 days to notify him if it considered his requests unclear, ambiguous, or incomplete, and if it failed to do so he was entitled under 7 C.F.R. § 400.768(c) to assume

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[6] His first request articulated his policy argument (that he did not have to raise a diseased crop to maturity) and stated "please define policy and procedure in this matter" (App. 90-91), and his second request stated "[p]lease be advised that I continue to request a final agency determination on this matter." (App. 79).

his interpretation (including his interpretation that he did not have to raise a damaged and diseased crop to maturity (*see* App. 90-91)) was correct for the 2005 crop year. (*See* App. 58). Hence, Mr. Lackey argued that since RMA had failed to provide either response, Mr. Lackey's interpretations of the relevant policies and procedures must be deemed correct for the 2005 crop year.

On September 15, 2006, an NAD Deputy Director upheld the Hearing Officer's April 19, 2006 Determination. (App. 49-63). However, in addition, the NAD Deputy Director rejected Mr. Lackey's arguments, concluding that the Hearing Officer had erroneously found that RMA did not "respond" to the July 10, 2005 request for an FAD. (App. 61). This was because, according to the Director, the RMA had, in fact, "responded" to the request – by refusing Mr. Lackey's request for an FAD and directing him to mediation or arbitration with ARMtech. (*See* App. 69). Mr. Lackey timely submitted a request for reconsideration of the NAD Deputy Director's September 15, 2006 determination, pursuant to 7 C.F.R. § 11.11.[7]

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[7] On September 21, 2006, the RMA issued FAD-059, basically disagreeing with Mr. Lackey's interpretation proffered over a year beforehand. http://www.rma.usda.gov/regs/533/2006/fad-59.html. Rather than incur even more "red tape" time and expense in pursuing an appeal of that FAD, Mr. Lackey chose to stand on his challenge under 7 C.F.R. § 400.768(e). The RMA and ARMtech presumably maintain that the tardy FAD is now "binding" in any mediation or arbitration between Mr. Lackey and ARMtech under 7 C.F.R. § 457.8(b)(20)(a)(1)(i).

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However, on September 28, 2006, the NAD Director denied Mr. Lackey's request for reconsideration of the September 15, 2006 determination, and issued a final determination, stating that judicial review was available pursuant to 7 U.S.C. § 6999. Thus, Mr. Lackey appealed the NAD Director's Final Determination to the District Court of New Mexico and the matter was referred to a Magistrate Judge. (App. 25-31).

On February 21, 2008, the Magistrate Judge issued a Report and Recommendation upholding the NAD's decision. (App. 25-31). On March 28, 2008, the District Court adopted the Magistrate Judge's Report and Recommendation over Mr. Lackey's objection and affirmed the decision of the USDA. (App. 23-24). Mr. Lackey timely appealed to the United States Court of Appeals for the Tenth Circuit. On June 25, 2010, the Tenth Circuit issued an order and judgment affirming the District Court, and holding that the RMA had "responded" to Mr. Lackey's request for an FAD. (App. 1-22). Mr. Lackey timely filed this Petition.

As discussed below, Mr. Lackey maintains that the FAD is a nullity because 7 U.S.C. § 1506(r)(3) and 7 C.F.R. § 400.768(e) prohibit the RMA from issuing binding FADs long after the 90-day period under 7 C.F.R. § 400.768(e) has expired. Mr. Lackey attempted to appeal the FAD (App. 32-48) but the Hearing Officer held that he did not have jurisdiction to hear the appeal. (App. 43).

ARGUMENT

The standards for reviewing a federal agency's interpretation of its own regulations are set forth on pages 13-14 of the Tenth Circuit's Order and Judgment. Under the Administrative Procedures Act:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall* –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) *hold unlawful and set aside agency action*, findings, and conclusions found to be –
>
> (A) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or *short of statutory right*;
>
> (D) *without observance of procedure required by law*;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise

> reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (2005) (emphasis added). In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), this Court held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* at 843. (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44.

Courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994). Courts may not "decide which among several competing interpretations [of an agency's own regulation] best serves the regulatory purpose." *Id.* Instead, courts must "give effect to the agency's interpretation so long as it . . . 'sensibly conforms to the purpose and wording of the regulations.'" *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51 (1991). "But to prevent agencies from circumventing the notice-and-comment process by rewriting regulations under the guise of interpreting them,

[courts] will reject an agency interpretation that is 'plainly erroneous or inconsistent with the regulation.'" *Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

Congress mandated that the FCIC must establish procedures and time limits for providing FADs when they are requested, and Congress also mandated a specific consequence if FCIC fails to provide them in a timely manner:

Procedures for responding to certain inquiries

(1) Procedures required

> The [FCIC] shall establish procedures under which the [FCIC] will provide a *final agency determination* in ***response*** to *an* ***inquiry*** *regarding the interpretation by the [FCIC] of this chapter* ***or any regulation***[8] *issued under this chapter.*

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[8] As noted above, 7 C.F.R. § 457.8(b) (now Subsection (f) in the current version) states that "[p]rocedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at http://www.rma.usda.gov/ or a successor Web site will be used in the administration of this policy, including the adjustment of any loss or claim submitted hereunder." The Handbook in question is issued by the FCIC and published on the RMA Web site and is therefore used in the administration of Mr. Lackey's policy, including the adjustment of any loss or claim submitted thereunder. *See id.*

> (2) Implementation
>
> Not later than 180 days after June 23, 1998, the [FCIC] shall issue regulations to implement this subsection. At a minimum, the regulations shall establish –
>
> (A) *the manner in which inquiries described in paragraph (1) are required to be submitted* to the [FCIC]; and
>
> (B) *a reasonable maximum number of days within which the [FCIC] will* ***respond*** *to* ***all*** *inquiries.*
>
> (3) Effect of failure to timely ***respond***
>
> *If the [FCIC] fails to* ***respond*** *to an* ***inquiry*** *in accordance with the procedures established pursuant to this subsection, the person requesting the interpretation of this chapter or regulation may assume the interpretation is correct for the applicable reinsurance year.*

7 U.S.C. § 1506(r) (2005) (emphasis added). Subsection (1) addresses "inquiries" for FADs, and Subsection (3) provides consequences if the FCIC fails to "respond" to such "inquiries" in accordance with the procedures established under that Subsection.[9]

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[9] Footnote 9 of the Tenth Circuit's Order and Judgment characterized Mr. Lackey's citation of 7 U.S.C. § 1506(r) as a "new claim" that was supposedly "raised for the first time in his objection to the Magistrate Judge's recommendations, which did

(Continued on following page)

The Regulation promulgated under the aforementioned statute is 7 C.F.R. § 400.768. Subsection (a) of that Regulation states that the "FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement." 7 C.F.R. § 400.768(a). But if a farmer submits a *mandatory* request for an interpretation of something – such as an official FCIC policy, especially in anticipation of

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not mention the issue." (App. 16 n.9). There is a difference between raising a new claim and citing a controlling statute (as counsel are obligated to do) that supports a claim that has already been made. Mr. Lackey simply cited a controlling federal statute that supported a claim he had raised over and over again in the proceedings below, including his argument about the consequences of the FCIC's failure to timely respond to his request for an FAD. The Magistrate Judge was aware of that claim as evidenced by his discussion of 7 C.F.R. § 400.768(e) in paragraphs 9, 12, and 13 of his Report and Recommendation. (App. 29, 30 ¶¶9, 12, 13). And the Tenth Circuit recognized on page 13 of its Order and Judgment that Mr. Lackey had consistently raised his claim that he was entitled to assume his interpretation was correct for the crop year. (App. 18 ("Lackey contends (*as he always has*) . . . " (emphasis added)). Even if Mr. Lackey cited this statute for the first time in his appeal to the Tenth Circuit, and even if the citation of that authority somehow constituted a new argument on appeal, the Tenth Circuit would have been entitled to consider it. *See, e.g., Gaither v. Aetna Life Ins. Co.*, 394 F.3d 792, 812 (10th Cir. 2004) ("[t]here is an exception to [the] general rule [prohibiting consideration of new arguments on appeal] when issues are raised for the first time on appeal and they involve 'questions of law, the proper resolution of which [is] beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice.'" *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990)).

mandatory mediation or arbitration with an FCIC insurer – the RMA has a "binary" choice:

> (b) If, in the sole judgment of FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will *notify* the requester that the request is unclear, ambiguous or incomplete, within 30 days of such request.
>
> (c) FCIC will provide a *final determination* of the interpretation to a request that meets all the conditions stated herein to the requester in writing, and at FCIC's discretion in the format in which it was received, within 90 days of the date of receipt by FCIC.
>
> (d) If a requestor is notified that a request is unclear, ambiguous or incomplete under section 400.768(b), the time to respond will be tolled from the date FCIC notifies the requestor until the date that FCIC receives a clear, complete, and unambiguous request.
>
> (e) If a *response* is not provided within 90 days, the requestor may assume the interpretation provided is correct for the applicable crop year.

7 C.F.R. § 400.768(b)-(e) (emphasis added). Both the enabling statute and the Regulation promulgated thereunder recognize that time is of the essence, as it should be for financially devastated farmers with short crop seasons who are trying to recover insurance proceeds for lost or damaged crops.

In short, Congress mandated that there would be *some* deadline which, if missed, would permit the requestor to assume that the interpretation provided would be correct for the applicable crop year. 7 U.S.C. § 1506(r)(3). The USDA "filled in the gap" by setting 90 days as the applicable deadline. 7 C.F.R. § 400.768(e). That is the number of days the USDA chose to impose upon itself, and that is the deadline it is obligated to honor. *See F.C.I.C. v. Merrill*, 332 U.S. 380, 385 (1947) (holding that the FCIC's regulations are "binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations. . . ."); *see also id.* at 387-88 (Jackson, J., dissenting: "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"). There are three scenarios envisioned under the Regulation.

First, if a farmer submits an unclear, ambiguous, or incomplete request, the FCIC must notify the farmer within 30 days of the defect under Subsection (a), and the FCIC's deadline to respond is tolled under Subsection (d) until the FCIC receives a clear, complete, and unambiguous request from the farmer.

Second, if a farmer submits a written request (or corrects a previously unclear, ambiguous, or incomplete request) that meets all the conditions stated in the regulation (*e.g.*, if it is clear, complete, and unambiguous) and at FCIC's discretion in the format in which it was received, the FCIC *must* provide a final

determination within 90 days of the date of receipt of the request by the FCIC.

Third, if a farmer submits a written request (or corrects a previously unclear, ambiguous, or incomplete request) that meets all the conditions stated in the regulation (*e.g.*, if it is clear, complete, and unambiguous) and the FCIC fails to respond within 90 days, the farmer is entitled to assume the interpretation provided by the farmer is correct for the applicable crop year.

And the type of "response" required under 7 C.F.R. § 400.768(e) is the same type of "response" required under 7 U.S.C. § 1506(r)(3) – a "response" to a request for an FAD. There is no other reasonable interpretation of the statute and regulation.

The federally reinsured insurance company, ARMtech, told Mr. Lackey that he would need to raise his crop to maturity before it would adjust the loss. (App. 88). Mr. Lackey therefore told RMA in no uncertain terms that he thought this was improper. (App. 90-91). And he needed and requested clarification as to whether he would have to raise his crop to maturity instead of abandoning it – and possibly losing insurance coverage. (App. 90-91). He plainly asked the RMA to "define policy and procedure in this matter." (App. 91). The RMA's regulations therefore gave the RMA 90 days to provide Mr. Lackey with an FAD under 7 C.F.R. § 400.768(c). If the RMA considered Mr. Lackey's request to be unclear, ambiguous, or incomplete, then it needed to follow its own

regulation, 7 C.F.R. § 400.768(b), and advise Mr. Lackey of that fact within 30 days, especially since the 2005 crop year was progressing and Mr. Lackey needed guidance.

Mr. Lackey's predicament was as follows:

1. The insurer refused to adjust the farmer's loss for disease, but instead told the farmer he would have to raise his 2005 crop to maturity before the loss could be determined (App. 88);

2. The farmer would have to incur additional expenses, that are arguably not covered by insurance, to raise the diseased and damaged crop to maturity (App. 90-91);

3. There are no statutes or regulations that require this;

4. Both the regulations and the insurance policy arguably indicate that coverage might be excluded if a farmer abandoned the diseased and damaged crop, 7 C.F.R. § 457.8(b)(12);

5. The farmer was required to mediate or arbitrate his dispute with his insurer, 7 C.F.R. § 457.8(b)(20);

6. Because the farmer's dispute involved a policy of the FCIC, the farmer was required to obtain an FAD from the RMA before mediating or arbitrating, 7 C.F.R. § 457.8(b)(20)(a)(1);

7. If the farmer failed to obtain the required FAD, any agreement or award in mediation or arbitration would have been automatically nullified, 7 C.F.R. § 457.8(b)(20)(a)(1)(ii).

8. If the farmer obtained an FAD it would have been binding in mediation or arbitration with the insurer, 7 C.F.R. § 457.8(b)(20)(a)(1)(i);

9. The farmer asked the RMA for an FAD (App. 79, 91), but the RMA refused to do this, and failed to notify the farmer of any defects in his request for an FAD, but instead told the farmer to take up his dispute with the insurer (App. 84-86, 76-79);

10. Long after the 2005 crop year ended, the RMA directed the farmer to "amend" his request (App. 58), and then issued an after-the-fact FAD that was adverse to his position about whether he could abandon his 2005 crop.

Instead of substantively responding to Mr. Lackey's request, the RMA "responded" by telling Mr. Lackey to go away and take up the dispute with his insurer. (App. 84-86). Mr. Lackey again told the RMA that he "continue[d] to request a final agency determination in this matter." (App. 79). Again, the RMA had 30 days to notify him if it considered his requests unclear, ambiguous, or incomplete, 7 C.F.R. § 400.768(b), or 90 days to provide the requested FAD, 7 C.F.R. § 400.768(c), or Mr. Lackey was entitled

to assume the interpretation he provided (*i.e.*, that he did not have to raise his 2005 damaged and diseased crop to maturity) was correct, 7 C.F.R. § 400.768(e).

When the RMA received Mr. Lackey's requests for an FAD in July and October of 2005 (App. 79, 91), either the RMA considered his requests unclear, ambiguous, or incomplete, or it did not. If it did, it had 30 days to so notify Mr. Lackey. 7 C.F.R. § 400.768(b). If it did not, it was required to issue an FAD. 7 C.F.R. § 400.768(c) & (e). Instead, the RMA brushed Mr. Lackey aside, declined to provide him with an FAD, and told him to go away and take up his dispute with his insurer. It was only after the Hearing Officer sided with Mr. Lackey, and long after the 2005 crop year had ended (*see* App. 63), that the RMA took the position that it was entitled to a second chance. It attempted to justify this with an arbitrary and capricious interpretation of the regulations. First, it claimed that it "responded" to Mr. Lackey's original requests under 7 C.F.R. § 400.758(e) – but the "responses" were simply acknowledgements of Mr. Lackey's correspondence coupled with a *refusal* to provide an FAD or a *notice* that Mr. Lackey's requests were somehow unclear, ambiguous, or incomplete. Then, the RMA claimed that Mr. Lackey's original requests were deficient because they did not provide his interpretation of the relevant policy provisions. (*See* App. 57). The RMA purported to "grant" Mr. Lackey ten days to correct these alleged deficiencies. (App. 57-58). But this happened in May of 2006 (App. 57), long after the 2005 crop season had ended

and long after Mr. Lackey needed clarification as to whether he could abandon his 2005 cotton crop.

And the District Court and the Tenth Circuit upheld the RMA's arbitrary and capricious interpretation of its regulations. To compound the insult, Mr. Lackey was required to obtain the RMA's final interpretation of the FCIC's policy under both 7 C.F.R. § 400.768 and the insurance policy before mediating or arbitrating with his insurer, as the RMA told him to do, because the dispute involved an FCIC policy or procedure interpretation. *See* 7 C.F.R. § 457.8(b)(20)(a)(1). If Mr. Lackey failed to obtain an FAD, any agreement or award in mediation or arbitration would have been legally void under the Regulation and the Policy. 7 C.F.R. § 457.8(b)(20)(a)(1)(ii). But if he obtained an FAD, it would be legally binding in any mediation or arbitration. 7 C.F.R. § 457.8(b)(20)(a)(1)(i).

So Mr. Lackey tried to obtain an FAD from the RMA. But the RMA kept refusing to get involved and insisting that Mr. Lackey needed to take up his dispute with the insurer. The actions of the RMA left Mr. Lackey without a remedy because the insurer would not pay under the policy, and even if Mr. Lackey poured additional time and money into an arbitration or mediation, any agreement or award would have been legally void under 7 C.F.R. § 457.8(b)(20)(a)(1)(ii). This placed Mr. Lackey in a hopeless "Catch-22" situation. And it is this precise type of situation – when the RMA refuses to become involved as it is required to do by the controlling statute and

its own regulation – that entitles the farmer to assume that his interpretation provided is correct for the applicable crop year under 7 U.S.C. § 1506(r)(3) and 7 C.F.R. § 400.768(e). And the RMA does not get a "second bite at the apple" after the relevant crop year has ended by directing the farmer to "amend" his request to make it more "clear."

The Hearing Officer recognized this, but the USDA NAD Director, the District Court, and the Tenth Circuit failed to do so. The Tenth Circuit took the position that the RMA had "responded," within the meaning of 7 U.S.C. § 1506(r)(3) and 7 C.F.R. § 400.768(e), to Mr. Lackey's request for a mandatory FAD by effectively telling him to go away – instead of providing him with the FAD as required. (App. 19-21). In sanctioning the RMA's actions, the Tenth Circuit relied on *Merriam Webster's Collegiate Dictionary* (11th Ed. 2006) to formulate its interpretation of the word "response" as "1: an act of responding[10] 2: something constituting a reply or reaction." (App. 20). But this definition is completely circular and explains nothing. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (holding that "ERISA's nominal definition of 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 1002(6), is completely circular and explains nothing"). According to the Tenth Circuit, *any* communication by the RMA

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[10] In other words, a "response" is something that is "responsive."

that was triggered by Mr. Lackey's request would be sufficient – no matter how cursory or superficial or meaningless the "response."[11]

As noted above, the Tenth Circuit's *Merriam Webster* definition is completely inconsistent with the term "response" as used in 7 C.F.R. § 400.768(e) when that term is juxtaposed with the language in 7 U.S.C. § 1506(r)(3). The "response" required under 7 C.F.R. § 400.768(e) is the same "response" required under 7 U.S.C. § 1506(r)(3) – a "response" to a request for an FAD.

And it was erroneous for the Tenth Circuit to "defer" to a completely circular regulatory interpretation by the FCIC, especially when that interpretation contradicts the plain language of the applicable statute and regulation. The actions of the RMA, including its alleged "responses," were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A); they were "short of statutory right" under 5 U.S.C. § 706(2)(C); and they were "without observance of procedure required by law" under 5 U.S.C. § 706(2)(D). And the

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[11] Thus, for example, under the Tenth Circuit's *Merriam-Webster* definition, a letter stating "Dear Mr. Lackey, Thank you for your letter. We hope to get back to you in the next few years," or "Dear Mr. Lackey, Thank you for your letter. The RMA has chosen not to respond to your request for an FAD," or "Dear Mr. Lackey, Thank you for your request for an FAD. The RMA does not become involved in military matters," or simply "Dear Mr. Lackey, This acknowledges receipt of your letter" would suffice as a "response."

RMA's actions were "'plainly erroneous or inconsistent with the [statute and] regulation.'" *Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

The need for a timely response in the form of an FAD is highlighted here because the farmer was required to obtain the FAD before meditating or arbitrating with the insurer under 7 C.F.R. § 457.8(b)(20)(a)(1). And if he failed to obtain such an FAD, he would have been forced to incur the time and expense of a mediation or arbitration in which any agreement or award in his favor would have been legally void under 7 C.F.R. § 457.8(b)(20)(a)(1)(ii). On the other hand, if he obtained the FAD it would have been binding in the arbitration proceeding. And here an arbitration proceeding would have been unnecessary because Mr. Lackey's proffered interpretation of the FCIC's policy was correct.

CONCLUSION

When federally-insured farmers' crops are at risk, and when their insurers dispute whether the loss can be adjusted, time is of the essence, and the farmers count on the USDA to turn "square corners" with them, *see Merrill*, 332 U.S. at 385, which includes prompt and complete responses to requests for FADs under the USDA's regulations. The RMA's "hands off" attitude in this case reflects a problem that plagues the financially-strapped, and largely forgotten, agricultural industry in the United States. For the above reasons, Mr. Lackey respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WELDON LACKEY,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; MIKE JOHANNS, in his official capacity as Secretary of the United States Department of Agriculture,

Defendants-Appellees.

No. 08-2117.
(D. N.M.)
(D.C. No. 1:07-CV-00842-JCH-RLP)

(Filed Jun. 25, 2010)

ORDER AND JUDGMENT*

Before **KELLY**, **PORFILIO**, and **O'BRIEN**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Weldon Lackey seeks sanctions, authorized by 7 C.F.R. § 400.768(e) in appropriate cases, for what he claims was the United States Department of Agriculture's (USDA) failure to timely provide a final agency determination (FAD) in response to his request for an interpretation of policy and procedure. The Risk Management Agency (RMA), a division of the USDA, did not specifically answer Lackey's request for a policy interpretation. Instead it (timely) responded saying his request did not present a matter about which it could offer guidance – essentially, it lacked authority or responsibility to make a policy or procedure determination regarding his specific factual situation. Lackey availed himself of the intra-agency appeal process. The matter was presented to an agency hearing examiner who decided the RMA erroneously declined to offer policy guidance. Upon Lackey's further appeal the USDA ultimately required the RMA to provide the requested guidance (which it timely did on remand). However, the USDA also concluded the RMA's response to Lackey (saying his request was beyond its ken), while erroneous, was a "response" within the meaning of the statute and its implementing regulations. Therefore, it concluded, sanctions were not appropriate. Claiming the USDA's conclusion incorrectly applied the pertinent regulations Lackey sought judicial review under the Administrative Procedures Act (APA). He argued the regulations offered the RMA only a binary choice (seek clarification of the request or issue a FAD) and since it's "response" to his inquiry was neither he is entitled to sanctions. In affirming the agency

decision, the district court considered Lackey's "neither fish nor fowl" argument, but decided USDA's interpretation of its regulations was entitled to deference and, affording deference, its decision was neither incorrect nor unreasonable. We agree.

I. BACKGROUND

A. USDA Regulations

The 1938 Federal Crop Insurance Act ("Act" or "FCIA"), 7 U.S.C. § 1501-24, is designed to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." *Id.* § 1502(a). Congress created the Federal Crop Insurance Corporation ("FCIC" or "Corporation"), a government-owned corporation which acts as an "agency of and within the Department [of Agriculture]" to administer the Act. *Id.* § 1503. Congress also created the Risk Management Agency ("RMA") to supervise the FCIC and administer all programs authorized under the FCIA. 7 U.S.C. § 6933(a), (b)(1)-(3); 7 C.F.R. § 400.701. The RMA is headed by an Administrator appointed by the Secretary of Agriculture and who "also serve[s] as Manager of the Federal Crop Insurance Corporation." 7 U.S.C. § 6933(c). Thus, the RMA speaks for the USDA on matters relating to the FCIC.

The Act empowers the FCIC to provide crop insurance directly to farmers or provide reinsurance

"to the maximum extent practicable" to private entities providing such insurance. *Id.* § 1508(a)(1) & (k). It requires the FCIC to establish procedures for responding to specified types of inquiries from farmers and imposes a sanction if the response is not timely:

> (1) Procedures required
>
> The Corporation shall establish procedures under which the Corporation will provide a final agency determination in response to an inquiry regarding the interpretation by the Corporation of this subchapter or any regulation issued under this subchapter.
>
> (2) Implementation
>
> [T]he Corporation shall issue regulations to implement this subsection. At a minimum, the regulations shall establish –
>
> > (A) the manner in which inquiries described in paragraph (1) are required to be submitted to the Corporation; and
> >
> > (B) a reasonable maximum number of days within which the Corporation will respond to all inquiries.
>
> (3) Effect of failure to timely respond
>
> If the Corporation fails to respond to an inquiry in accordance with the procedures established pursuant to this subsection, the person requesting the interpretation of this subchapter or regulation may assume the

interpretation is correct for the applicable reinsurance year.

7 U.S.C. § 1506(r).

FDIC implemented § 1506(r) by regulation found at 7 C.F.R. § 400.768. It provides:

> (a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement.
>
> (b) If, in the sole judgment of FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will notify the requester that the request is unclear, ambiguous or incomplete, within 30 days of such request.
>
> (c) FCIC will provide a final determination of the interpretation to a request that meets all the conditions stated herein[1]

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[1] The requestor obligations are listed in 7 C.F.R. § 400.767 as follows:

> (a) All requests for a final agency determination under this subpart must:
>
> (1) Be submitted: [listing the specific addresses for letter, facsimile, or electronic mail]
>
> (2) State that it is being submitted under section 506(s) of the Act;
>
> (3) Identify and quote the specific provision in the Act or regulations for which a final agency determination is requested;
>
> (4) State the crop year for which the interpretation is sought;

(Continued on following page)

to the requester in writing, and at FCIC's discretion in the format in which it was received, within 90 days of the date of receipt by FCIC.

(d) If a requestor is notified that a request is unclear, ambiguous or incomplete under section 400.768(b), the time to respond will be tolled from the date FCIC notifies the requestor until the date that FCIC receives a clear, complete, and unambiguous request.

(e) If a response is not provided within 90 days, the requestor may assume the interpretation provided is correct for the applicable crop year.

(f) All agency final determinations will be published by FCIC as specially numbered documents on the RMA Internet website.

(g) All final agency determinations are considered matters of general applicability that are not appealable to the National Appeals

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(5) State the name, address, and telephone number of a contact person affiliated with the request; and

(6) Contain the requester's detailed interpretation of the regulation.

(b) The requestor must advise FCIC if the request for a final agency determination will be used in a lawsuit or the settlement of a claim.

(c) Each request for final agency determination under this subpart must contain no more than one request for an agency interpretation.

> Division.[2] Before obtaining judicial review of any final agency determination, the person must obtain an administratively final determination from the Director of the National Appeals division on the issue of whether the final agency determination is a matter of general applicability.

At issue here is the agency's interpretation of the term "response" in subsection (e).

II. FACTUAL AND PROCEDURAL HISTORY

Lackey is a cotton farmer in Lea County, New Mexico. He purchased multi-peril crop insurance for his 2005 cotton crop from a private provider re-insured by the FCIC. On June 7, 2005, Lackey presented his insurer with a claim for disease and hail damage to his cotton crop. The insurance adjustor adjusted for the hail damage, but would not adjust for disease loss until the crop reached maturity when actual losses could be determined. The response was a sore spot with Lackey who did not want to bring a diseased crop to harvest or wait to collect insurance monies. He thought the crop should be adjusted based upon an agricultural expert's report he provided to the insurance company. It said his cotton crop was

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[2] "The National Appeals Division [NAD] reports directly to the Secretary of Agriculture and is independent of other parts of USDA. Its sole mission is to provide fair and timely hearings and appeals to USDA program participants." http://www.nad.usda.gov

diseased.[3] Notably the report was based on a small sampling of his 2005 crop (six samples), did not analyze the degree of infestation and did not estimate the extent of expected loss. **[Appx. Vol. I at 19-20, Vol. II at 481.]**

On July 10, 2005, Lackey sent a written request to RMA entitled "Request for Determination of Failure to Comply with Policies and Procedures of Federal Crop Insurance Handbook." (Appx. Vol. I at 19.) Lackey's letter described his encounters with the insurance adjustors:

> I was systematically informed by [several insurance representatives] that the Loss Adjustment Standards manual makes no provisions for disease adjustment and that all green plants would be taken to harvest in their entirety or to harvest in designated strips. [The insurance adjustor] . . . proceeded to pull up green leafed cotton plants he did not consider "viable". I refused his

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[3] Lackey's report came from the New Mexico State University Plant Diagnostic Clinic. (Appx. Vol. II at 479-82.) Its diagnosis was apparently based on six plant samples Lackey submitted from his 2005 crop. The report identified the presence of "vercillium wilt" which is "a serious disease on cotton, especially in the Southwestern U.S. The disease is reported to cause loss of up to 75% in heavily infected crops." (*Id.* at 479.) The report also identified a fungus commonly known as "wet weather blight" which "is rarely serious, but occasional serious losses have been reported." (*Id.* at 481.) It further explained techniques to mitigate damage from the diseases. The report did not say his crop was heavily infected.

> adjustment on the basis that he could not differentiate diseased versus non-diseased plants visually. I requested a more qualified adjuster. . . .

(*Id.* at 20.) A second adjustor was sent to view the crop who again began to pull up plants. When Lackey objected, he was told "the only way they would adjust for disease was at harvest in the form of lost production." (*Id.*) Referring to the definition of "live plant" found on page 16 of the Loss Adjustment Standards handbook, Lackey's letter continued:

> Correctly interpreting the meaning of live plant with substantiated laboratory results by an Agricultural Expert should allow adjustment for diseased plants. When there is Agricultural Expert evidence of disease throughout a unit, with or without a quantifiable amount, deference should be given to the expert opinion and therefore to the insured. . . . Their position is that no one, not even experts, can accurately predict yield of diseased plants, therefore they want to go to harvest for accurate yields. Ironically, I too believe that no one, not even experts, can accurately predict yield of diseased plants, therefore, since I have proof of diseased plants . . . I should not have my risk increased by additional farming costs [or] forced to take a chance of any unit with compromised plants.

(*Id.* at 20-21.) He closed with the following request: "Please define policy and procedure in this matter." (*Id.* at 21.)

On September 30, 2005, the RMA Deputy Administrator for Compliance wrote to Lackey referring to a telephone conversation between them on July 25, 2005. In his letter, he explained Lackey's request dealt with a dispute between Lackey and his insurer and that RMA "does not normally get involved in such disputes." (*Id.* at 192.) *See* 7 C.F.R. § 400.768(a). "FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or an reinsurance agreement." The Deputy Administrator continued: "However, RMA is frequently asked to provide policy or procedure interpretations. There is a mechanism for requesting such interpretations contained at 7 C.F.R. part 400, subpart X or 7 C.F.R. subpart K." (*Id.*) He closed with the following statement: "If you think there is an issue regarding the interpretation of policy or procedure, you can request such interpretation from RMA." (*Id.* at 193.)

On October 5, 2005, Lackey e-mailed the RMA stating:

> Please be advised that I continue to request a final agency determination on this matter. In accordance with my Multi Peril Crop Insurance Policy, "if the dispute in any way involves a policy or procedure interpretation . . . either you or we must obtain an interpretation from FCIC in accordance with

> 7 CFR part 400, subpart X" . . . . Furthermore, in accordance with 7 CFR Subpart X 400.768(c), please note the 90 day time frame ends October 18, 2005. The following is my original request as submitted previously. Please advise if there are errors, omissions or any other information needed to complete this matter timely.

(*Id.* at 16.) The RMA denied his request for a final agency determination on October 17, stating in relevant part:

> Neither your letter of July 10 nor e-mail message of October 5 qualifies as a request for a final agency determination (FAD) under the regulations published at 7 C.F.R., Part 400, Subpart X. A FAD can only provide an interpretation of provisions of the Federal Crop Insurance Act . . . or regulations issued under the authority of the Act. Since your request involves a dispute over whether the loss adjustor properly identified "live" plants, and not an interpretation of the Act or regulations issued there under, your request does not qualify for a FAD.
>
> Your July 10 letter cites specific disagreements with your insurance provider concerning the determinations made during the stand reduction appraisal of your cotton. Specifically, you appear to question if the insurance provider could accurately determine the "live" plants that ultimately contribute to the lint. You are not questioning the meaning of the procedure. Therefore, your request

> also does not qualify for an interpretation of procedures by RMA under the provisions of section 20 of your policy.

(*Id.* at 4.)[4]

Lackey appealed from the RMA's determination to the USDA's National Appeals Division (NAD). Upon due consideration the hearing officer concluded in relevant part:

> On July 10, 2005, appellant sent a letter to RMA requesting a FAD. Appellant claimed that a provision in the Adjustment Standards means that a separate adjustment could be made for plants killed by disease. *RMA did not respond. Appellant sent an e-mail to RMA on October 5, 2005, again requesting a FAD. By letter of October 17, 2005, RMA finally responded to Appellant,* stating that neither Appellant's letter nor e-mail qualified as a proper request for a FAD.

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[4] A FAD is required within 90 days if "a request . . . meets all the conditions" enumerated in 7 C.F.R. § 400.767, reproduced *infra* at FN1. Lackey's July request clearly did not meet all the regulatory requirements. It did not mention its purpose was to request a final agency determination, it did not state it was being submitted under § 506(s) of the Act, and it did not identify and quote a specific provision in the regulation. We do not base our decision here on Lackey's failure to comply with these requirements. Rather, we note the failings of his request only as it assists our interpretation of the regulatory language. The hearing officer concluded the request "admittedly" was "unclear" and the RMA should have notified Lackey of that fact. (Appx. Vol. I at 64.)

(*Id.* at 62 (emphasis added.)) The hearing officer held that because Lackey's October 5 e-mail referenced his insurance policy provisions which were "set out in [their] entirety in Section 457.8" of the FCIC regulations, the insurance policy provisions were properly subject to a request for a final agency determination. (*Id.* at 64.) The insurance policy provisions/FCIC regulations require a final agency determination stating "whether a specific policy or procedure is applicable to the situation, how it is applicable, or the meaning of any policy or procedure . . . " which then becomes binding on the parties in subsequent dispute resolution procedures. (*Id.*) Therefore, the RMA erred in characterizing the request as a factual dispute and in failing to notify Lackey that his request was "unclear, ambiguous, or incomplete." (*Id.* at 65.)

Lackey requested the Director of NAD to review the hearing officer's determination. Specifically he wanted a decision making clear that, because the RMA did not notify him that his request was unclear, ambiguous or incomplete within 30 days[5] or issue a final agency determination within the 90 days allowed by regulation, § 400.768(e), he was entitled to the regulatory sanction – he could assume his interpretation of policy (that he should not be required to bring his crop to harvest before it could be adjusted

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[5] Lackey does not claim the failure to timely notify him that he must amend his request would, by itself, trigger the statutory sanctions. He maintains that, in the absence of such notice, the RMA must issue a FAD within 90 days.

for loss) was correct for the 2005 crop year. He also requested the Director to grant equitable relief for the maximum policy amount, $167,154, pursuant to 7 C.F.R. § 11.9(e). **[*Id.* at 108.]**

The NAD Director issued a decision affirming the hearing officer's findings and conclusions *except* its conclusion that the RMA did not timely respond to Lackey's request for a FAD. The Director stated the "RMA met its obligation to respond to [Lackey's] FAD requests with its letter dated September 30, 2005 and the October 17, 2005 adverse decision."[6] (*Id.* at 152.) Thus:

> The Hearing Officer's determination that RMA's response was erroneous, because it misinterpreted Appellant's request, means that RMA is now obliged to issue a new response to Appellant's request for a FAD. The 90-day period for RMA to respond to a request begins from the date it receives a clear, complete, and unambiguous request. I reiterate that RMA has indicated that it is in the process of issuing a FAD in accordance with the Hearing Officer's Appeal

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[6] "The Director may delegate his or her authority to conduct a review under this paragraph to any subordinate official of the Division other than a Hearing Officer. In any case in which such review is conducted by such a subordinate official, the subordinate official's determination shall be considered to be the determination of the Director and shall be final and not [administratively] appealable." 7 C.F.R. § 11.6(a)(3). Accordingly, we refer to "the Director" whether the decision was issued by the Director or an appropriate subordinate.

> Determination. If that new response is adverse to Appellant, he may appeal it pursuant to the applicable regulations.

(*Id.*) The decision also concluded because the crop insurance program was not a "covered" program under 7 U.S.C. § 7996(a)(2)(B), NAD lacked jurisdiction to grant equitable relief.[7] (*Id.*) Lackey then filed a request for reconsideration. The Director denied the request, stating: "That the RMA response was erroneous does not render it nonexistent. However, since it was erroneous, you are entitled to a new response. . . ." (*Id.* at 162.) The decision further stated: "This is a final determination of the National Appeals Division, for which judicial review is available pursuant to 7 U.S.C. § 6999."[8] (*Id.* at 163.)

Lackey sought judicial review of NAD's interpretation of the required "response." The district judge referred the matter to a magistrate judge who issued a report recommending the USDA's interpretation of its regulations be affirmed. Lackey objected, claiming the clear language of the regulation required the RMA to respond in one of two ways: either it must issue a FAD within 90 days or it must provide notice (within 30 days) that the request needs to be clarified.

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[7] Lackey does not challenge the USDA's jurisdictional decision.

[8] "A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." 7 U.S.C. § 6999.

He claimed a failure to timely do one or the other triggers the sanction he seeks (accepting his interpretation of FDIC policy). Lackey pointed to the regulation's enabling statute, which provides "[t]he Corporation shall establish procedures under which the Corporation *will provide a final agency determination in response* to an inquiry regarding the interpretation by the Corporation of this subchapter or any regulation issued under this subchapter." 7 U.S.C. § 1506(r)(1) (emphasis added). According to Lackey, this sentence plainly demonstrates Congressional intent to define a "response" as a "final agency determination." Because the agency's determination of its regulation is inconsistent with the enabling statute, he maintained it is not entitled to any deference.[9] The district judge rejected Lackey's objections and adopted the magistrate's recommendation, concluding RMA's September and October letters amounted to a timely "response to an inquiry," thus sanctions were inappropriate. **[Appx. Vol. II, tabs 3, 4 & 5.]**

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[9] His claim that the regulation or the USDA's interpretation is contrary to legislative intent was raised for the first time in his objection to the Magistrate Judge's recommendations, which did not mention the issue. In ruling on his objections the district court did not address the legislative argument. Nor will we as it came too late. "In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived. *See Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996)." *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001).

III. DISCUSSION

Our standard of review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which governs judicial review of agency actions, is well-known.

> [W]e review the lower court's decision de novo . . . [and] set aside the agency's action . . . if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' We will also set aside an agency action if the agency has failed to follow required procedures. . . . The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. Furthermore, [i]n reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.

Citizen's Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008) (quotations and citations omitted). "We give great deference to [an agency's] interpretation of its own regulations, and we will only reject those interpretations when they are unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning." *Utah Envtl.*

Cong. v. Richmond, 483 F.3d 1127, 1134 (10th Cir. 2007) (quotations omitted). "Thus, the ultimate standard of review is a narrow one [and we are] not empowered to substitute [our] judgment for that of the agency." *Id.* (quotations omitted).

Lackey contends (as he always has) 7 C.F.R. § 400.768, read in its entirety, can be construed only one way – the agency must either respond that his request was unclear, incomplete or ambiguous within 30 days of his request or it must issue a final agency determination within 90 days of his request.[10] As he reasons, since the RMA did not notify him that his request was wanting, it was required to issue a FAD within 90 days and its letter rejecting his request was obviously not a FAD. *Ergo*, there was no timely response and he is entitled to the sanction dictated in 7 U.S.C. § 1506(r) and § 400.768(e) – he may assume his interpretation is correct for the crop year. We are not persuaded.

His reading fails to account for the language of 7 C.F.R. § 400.768(a), quoted *infra* page 4, which

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[10] He claims the agency's interpretation rendered the enforceability provision meaningless, is inconsistent with the clear and specific terms of the regulation, is internally inconsistent and is contrary to legislative intent. We reject the former arguments and do not reach the last one. *See* FN9, *supra*. In any event, the best measure of legislative intent is the words of the statute. Here those words are not ambiguous, "If the Corporation fails to respond to an inquiry *in accordance with the procedures established pursuant to this section*, the person [is entitled to sanctions]." 7 U.S.C. § 1506(r) (emphasis added).

precludes FCIC from interpreting specific factual situations or cases. That is a threshold determination. If the requested interpretation is not one permitted by the regulations the procedural requirements that follow, including time lines, matter not. Here the RMA concluded Lackey's request for a policy or procedural interpretation was not, to borrow a phrase, justiciable in that forum. It erred, according to the hearing officer and the NAD. But that does not make the RMA's decision a nullity, entitling Lackey to a retroactive sanction. It simply means, as the NAD and the District Court determined, the RMA must, on remand, timely respond to his request by either deciding to seek clarification or issue a FAD. The time to do so necessarily runs from the date of a remand to the RMA, which came only after Lackey fully exhausted his agency appeal rights. When it finally came the RMA timely issued a FAD.[11] We see no ambiguity in the regulations; the FCIC cannot issue a FAD if the request for an interpretation is not within its cognizance regardless of how clear, unambiguous or complete the request may be. In any event Lackey was timely notified of RMA's determination. To the extent a response was required its response was sufficient.[12]

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[11] The FAD was issued on September 21, 2006. See http://www.rma.usda.gov/fcic: FAD-059. Lackey did not appeal from the FAD.

[12] Lackey's first letter was dated July 10, 2005. On July 25, 2005 the RMA Deputy Administrator for Compliance spoke with

(Continued on following page)

Lackey claims that unless a "response," as he defines it, is required the USDA's interpretation allows the RMA to "simply communicate in any arbitrary form or fashion with the requestor, and, in the event that RMA fails to issue a timely FAD, the requestor would be left without recourse." (Appellant's Br. at 16-17.) Hyperbole!

The September 30, 2005 letter clearly notified Lackey that the RMA did not perceive he was requesting a FAD. Indeed, the RMA's response directed him to the procedures to do so if, in fact, that is what he wanted. Accordingly, the RMA rejected a request to intercede in what it considered to be a factual dispute, beyond its authority to resolve. Under these circumstances neither the statute nor the regulations mandate the specific "response" Lackey demands.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The common definition of "response" is "1: an act of responding 2: something constituting a reply or reaction." *Merriam-Webster's Collegiate Dictionary* (11th Ed. 2006). Contrary to Lackey's assertions, the NAD did not hold that *any* communication from RMA would qualify as a response. It held the September 30, 2005 letter and the October 17, 2005

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him about it by phone, explaining RMA's position that it did not have authority to address his request.

adverse decision qualified as responses. These communications directly addressed the substance of Lackey's claims as understood by the RMA. There is no indication the RMA was being disingenuous in its interpretation of Lackey's request. The Director of the NAD was correct: "[t]hat the RMA response was erroneous does not render it nonexistent."[13] (Appx. Vol. I at 162.)

Lackey's claim that the interpretation leaves him without remedy is without merit. Lackey appealed from the October 17, 2005 adverse determination (received within 90 days of his inquiry) and at the end of the day received a favorable decision – the RMA originally erred and should have issued a final agency determination. He ultimately received the requested FAD, albeit after considerable effort and delay resulting from unusual circumstances.

While Lackey's interpretation of the regulation is not patently unreasonable, the agency's interpretation is equally, if not more, reasonable. It provides the RMA the ability to craft a response it deems most appropriate to each discrete inquiry. The fact that, in this instance, its perception was incorrect does not

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[13] In his reply brief, Lackey argues we should take judicial notice that the RMA has issued a public statement (last modified on January 1, 2006) which interprets "the regulation at issue in a manner supporting Lackey's interpretation." (Reply Br. at 1.) He argues the public statement negates the deference we owe the USDA in this matter. The "public statement" Lackey refers to is merely a reiteration of the language in 7 C.F.R. § 400.768 and sheds no light on the regulatory interpretation at issue here.

lead to a conclusion that it must now be sanctioned. Lackey failed to demonstrate the final decision of the USDA is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

AFFIRMED.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WELDON LACKEY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE and MIKE JOHANNS, in his official capacity as Secretary of the United States Department of Agriculture,

Defendants.

Civ. No. 07-842 JH/RLP

(Filed Mar. 28, 2008)

ORDER

THIS MATTER comes before the Court on the Plaintiff's Objections to Magistrate Judge's Report and Recommendation, and the Court having conducted a *de novo* review of the record, finds that the objections are not well-taken and that the Court shall adopt the Magistrate Judge's Report and Recommendation.

IT IS THEREFORE ORDERED that the Magistrate Judge's Report and Recommendation are adopted by the Court and the decision of the United State Department of Agriculture is affirmed.

IT IS SO ORDERED.

/s/ Judith C. Herrera
Judith C. Herrera
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WELDON LACKEY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE and MIKE JOHANNS, in his official capacity as Secretary of the United States Department of Agriculture,

Defendants.

Civ. No. 07-842 JH/RLP

(Filed Feb. 21, 2008)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION[1]

1. THIS MATTER comes before the Court as an appeal from a decision rendered by the United States Department of Agriculture (USDA) and is thus governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). For the reasons set forth below, I

[1] Within ten (10) days after a party is served with a copy of the Magistrate Judge's Report and Recommendation that party may, pursuant to 28 U.S.C. § 636 (b)(1), file written objections in the United States District Court to the Report and Recommendation. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the Report and Recommendation. If no objections are filed, no appellate review will be allowed.

recommend that the decision of the USDA be affirmed.

2. Prior to 1938, crop insurance was virtually unavailable because insurance companies determined that multiple peril crop insurance posed too great a financial risk. To remedy the problem, Congress passed the Federal Crop Insurance Act in which it created the Federal Crop Insurance Corporation (FCIC) to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502. The FCIC provides insurance to farmers by (1) selling insurance through private insurance agents; (2) reinsures private insurance companies who provide crop insurance; or (3) directly provides crop insurance to farmers. 7 U.S.C. §§ 1507 & 1508. *See generally Owen v. Crop Hail Management*, 841 F. Supp. 297, 300-301 (W.D. Mo. 1994).

3. Because the issue in this appeal only concerns construction of an FCIC regulation, the Court only provides facts relevant to that matter. In this case, Plaintiff insured his cotton crop with a private insurance company and that company was reinsured by the FCIC. A dispute arose as to whether the crop had suffered a loss from disease. On July 10, 2005 Plaintiff sent a written request to the USDA's Risk Management Agency ("RMA"). He requested a Final Agency Decision seeking interpretation of certain FCIC policies and procedures.

4. On September 30, 2005, in response to Plaintiffs request, the RMA wrote a letter to Plaintiff in which it stated that this appeared to be a dispute between Plaintiff and the private insurer and that RMA would not get involved. Administrative Record 000006-07.

5. On October 17, 2005 the RMA again declined to address the issue, stating that Plaintiffs July 10, 2005 letter did not constitute a request for a Final Agency Decision. *Id.* at 000004-05.

6. Plaintiff appealed to the United States Department of Agriculture's National Appeals Division ("NAD") pursuant to 7 U.S.C. § 6992(d), 7 C.F.R. § 457.8(20)(a)(1)(iv), and 7 C.F.R. § 11.1.

7. A hearing was held on April 19, 2006. The hearing director first determined that the RMA had incorrectly characterized Plaintiff's request for a Final Agency Decision as a dispute between Plaintiff and his insurance company, Because the July 10, 2005 letter was a proper request for a Final Agency Decision, the RMA should have issued a Final Agency Decision. *See* Administrative Record, 000064. The hearing officer then stated that C.F.R. § 400.768(c) gives the requester (Plaintiff) 90 days to amend his request to meet the RMA objections. *Id.* at 000065. The hearing officer did not rule on the substantive, underlying issue, *i.e.*, whether the crop was insured, finding that interpretation was the duty of the RMA and not an NAD hearing officer. *Id.*

8. Having received this decision, Plaintiff sought a modification: He argued that the hearing officer had incorrectly construed C.F.R. § 400.768(c) and sought relief. On September 28, 2006 the NAD Director issued a Final Agency Determination adverse to Plaintiff, Administrative Record, 000162-163. The ruling indicated that the Agency's responses to Plaintiff on September 30 and October 17, 2005 complied with the regulation at issue and that Plaintiff was not entitled to relief. It is from this decision that Plaintiff appeals,

9. The regulation at issue, 7 C.F.R. § 400.768 provides in pertinent part:

> (a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy. . . .
>
> (b) if, in the sole judgment of the FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will notify the requester that the request is unclear, ambiguous, or incomplete, within 30 days of such request.
>
> (c) FCIC will provide a final determination of the interpretation to a request that meets all the conditions stated herein to the requester in writing, and at FCIC's discretion in the format in which it was received within 90 days of the date of receipt by FCIC.

> (d) If a requester is notified that a request is unclear, ambiguous or incomplete under section 400.768(b), the time to respond will be tolled from the date FCIC notifies the requester until the date that FCIC receives a clear, complete, and unambiguous request.
>
> (e) If a response is not provided within 90 days, the requester may assume the interpretation provided is correct for the applicable crop year.

10. The Government argues that the foregoing regulation only requires the FCIC to "respond" to a requester within the 90-day limit, which it did on September 30, 2005, and that an agency's interpretation of its own regulation is entitled to great deference and cannot be overturned absent the Court's finding that the agency interpretation or ruling is arbitrary and capricious. *See* United States Response Brief [Doc. 33] at 5-10.

11. "[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Mission Group Kansas, Inc. v. Riley,* 146 F.3d 775, 780 (10th Cir. 1998) (internal quotation marks & citations omitted). And, "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamle v. United States Trustee,* 540 U.S. 526, 534 (2004).

12. The parties have not provided the Court with any case law interpreting the regulation at issue, nor has the Court located any such cases, A'though 7 C.F.R. § 400.768(c) clearly mandates that the FCIC to provide a final determination within 90 days, subparagraph (e) provides that if a "response" is not received within 90 days, a requester may assume his interpretation is correct.

13. If the Court were to follow Plaintiffs reasoning that subparagraph (c) in all instances requires a Final Agency Decision within 90 days, then the FCIC would lose every time it issued a "response" to a request for a Final Agency Decision. Such a result is clearly at odds with subparagraph (e). A court owes deference to an agency's interpretation of its own regulation when "the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). The use of the word "response" in subparagraph (e), may be susceptible to some ambiguity, but the Court finds it is broad enough to encompass all communications from the FCIC to requesters, including Final Agency Decisions.

14. Therefore, the September 30, 2005 response to Plaintiff constitutes agency action within the required 90-day time limit.

RECOMMENDED DISPOSITION

I recommend that the decision of the United States Department of Agriculture be affirmed.

/s/ Richard L. Puglisi
United States
Magistrate Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the Matter of	)	
WELDON LACKEY	)	
	)	
and	)	Case No. 2007W000134
RISK MANAGEMENT AGENCY	)	
	)	

JURISDICTIONAL DETERMINATION

Weldon Lackey (Appellant) appealed a decision of the Risk Management Agency (RMA) dated September 21, 2006. That decision is Final Agency Determination No. 059 (FAD-059) rendered by RMA pursuant to Title 7 Code of Federal Regulations (C.F.R.), Part 400, Subpart X (§ 400.765-§ 400.768). In FAD-059, RMA interpreted Section 8 of the Cotton Crop Insurance Provisions (7 C.F.R. § 457.104) of the FCIC Common Crop Policy (7 C.F.R. § 457.8) (hereafter referred to as the Policy) and Section 6(B)(2)(b) of the FCIC-approved Cotton Crop Adjustment Standards for the 2005 and Succeeding Crop Years (Loss Adjustment Standards).

This is Appellant's second appeal dealing with a loss to his 2005 cotton crop resulting from fungal infestation and hail damage. In National Appeals Division (NAD) Appeal No. 2006W000331, Appellant appealed the refusal of RMA to render a FAD, Appellant had

federal crop insurance (reinsured by FCIC) and a dispute developed over the loss adjuster's interpretation of the Policy and Loss Adjustment Standards. Appellant sought a FAD from RMA, but RMA characterized the controversy as a factual dispute between Appellant and the insurance adjuster, and, thus, not a proper controversy for issuance of a FAD. In a determination rendered in the previous appeal, I decided RMA had erred in declining to issue a FAD. That decision was upheld on Director review.

RMA issued FAD-059 on September 21, 2006. On October 28, 2006, Appellant submitted a request to the Director of NAD, pursuant to 7 C.F.R. Section 400.768(g). That section directs that a person receiving a FAD may not undertake judicial review until obtaining an administratively final determination from the Director on the issue of whether the final agency determination is a matter of general applicability. Appellant requested such a determination by the Director, but the request resulted in a decision by the NAD Deputy Director, dated November 27, 2006, that FAD-059 was a decision appealable to NAD. As a result, on November 30, 2006, the NAD Western Regional Office assigned this appeal to me.

By letter dated December 8, 2006, RMA requested reconsideration of the Deputy Director's decision. The NAD Director responded by advising RMA there is no provision for reconsideration of an appealability ruling. The Director advised the parties the reconsideration request would be forwarded to this assigned hearing officer to consider as a challenge to NAD

jurisdiction. Therefore, the threshold issue in this appeal is whether this NAD hearing officer has jurisdiction to hear an appeal of the decision rendered in FAD-059.

I held a jurisdictional prehearing conference on December 21, 2006. At my direction the participants addressed NAD jurisdiction. I gave the parties additional time to submit documentary materials. Appellant and RMA filed briefs in support of their respective positions, and each has responded to the submission of the other. In addition RMA has submitted an Agency Record of 575 pages.

At prehearing conference, in addition to the issue of jurisdiction I addressed all normal prehearing conference matters. Appellant elected that his appeal be addressed by record review. On December 22, 2006, I issued a Contingent Notice of Record Review, setting out guidelines for record review in the event I determine I do have jurisdiction. However, based on (1) the appeal record, including information received at jurisdictional prehearing and later submissions of the parties; (2) the regulations applicable to the issuance of a FAD; and (3) the regulations regarding NAD appeals, it is my conclusion a NAD hearing officer does not have jurisdiction to hear an appeal regarding the correctness of RMA's interpretation of regulations set forth in a FAD, prior to a decision by the Director on the issue of general applicability.

JURISDICTIONAL ISSUE

To determine whether I as a NAD Hearing officer have jurisdiction to continue this appeal, I had to resolve the following issues.

1. Does the appealability determination rendered November 27, 2006 bar inquiry into NAD's jurisdiction?
2. Does a NAD hearing officer have jurisdiction to determine the correctness of RMA's interpretation of the Common Crop Policy and Loss Adjustment Standards?
3. Is this an appeal from a "procedure" that is allowed under Section 457.8(b)(20)(a)(1)(iv) of the Policy?
4. Can FAD-059 be appealed to NAD because it was not timely issued?
5. Does FAD-059 constitute a decision of general application?

DISCUSSION

Applicable Laws and Regulations

The issue of jurisdiction involves a complicated interplay of various related laws and regulations. Applicable to this dispute are laws and regulations by which NAD's authority is established, laws and regulations regarding the issuance of final agency determinations by RMA, and provisions of the Common Crop Insurance Policy, including the Cotton Crop Provisions.

A. NAD Laws

The statutory authority for creation of NAD is codified at 7 U.S.C. § 6991 *et.seq.* Section 6992(d) deals with appealability. It states that if an officer, employee, or committee of an agency determines a decision is not appealable and a participant appeals the decision to the NAD Director, the Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal. The Director's decision on appealablity is an administratively final decision. Promulgated in accordance with those laws, NAD's regulations were established at 7 C.F.R. Part 11. Section 6992(d) is mirrored in 7 C.F.R. § 11.6, with no substantive changes or additions.

B. RMA Laws

The Federal Crop Insurance Act (the Act), 7 U.S.C. § 1501 et.seq., provides at Section 1506(r) that RMA shall establish procedures under which it will provide a final agency determination in response to an inquiry regarding interpretation of the Act or regulations issued under the Act. Based on that mandate, regulations were promulgated addressing rules and criteria for obtaining an RMA FAD, which are published at 7 C.F.R., Part 400, Subpart X. Section 400.767 establishes "requester obligations" which include a written request identifying and quoting the specific provision in the Act or regulation for which a

FAD is sought. Section 400.768 identifies "FCIC (RMA) obligations" which include a prohibition against interpreting any specific factual situation, and a procedure to notify a requester if the request is unclear, ambiguous or incomplete. Section 400.768(g) states that all FADs issued pursuant to Subpart X are considered matters of general applicability that are not appealable to NAD, but before a person receiving a FAD may obtain judicial review he or she must first obtain a final determination of the NAD Director on the issue of whether the FAD is a matter of general applicability.

C. The Policy

The Common Crop Insurance Policy is set out in its entirety at 7 C.F.R. § 457.8. Section 457.8(b)(20) of the Policy deals with appeals and administrative and judicial review. Section 457.8(b)(20)(a)(1) specifies that all disputes involving determinations made by FCIC/RMA (with certain exceptions not relevant to the facts of this appeal) are subject to mediation or arbitration. If the dispute in any way involves a policy or procedure interpretation regarding application of, meaning, or applicability of a provision or procedure, an interpretation must be obtained from RMA in accordance with 7 C.F.R., Part 400, Subpart X. Section 457.8(b)(20)(a)(1)(i) states that the interpretation by RMA is binding in any mediation or arbitration. Section 457.8(b)(20)(a)(1)(iii) states that an RMA interpretation of a "policy provision" is considered a rule of general applicability, is not

appealable, and a party who disagrees with the interpretation must obtain a NAD Director's review in accordance with 7 C.F.R. § 11.6 (appealability/matter of general applicability). Section 457.8(b)(20)(a)(1)(iv), states an interpretation of a "procedure" by RMA may be appealed to NAD in accordance with 7 C.F.R. § 11.

Does the appealability determination rendered November 27, 2006 bar inquiry into NAD jurisdiction.

Appellant claims RMA's challenge to jurisdiction is an impermissible attempt to seek review of a decision which is not subject to appeal. He points out that he filed a request for a Director's determination pursuant to 7 C.F.R. Section 400.768(g). That rule states that a FAD issued by RMA is considered a matter of general applicability and is not appealable to NAD. The sole exception is an appeal to the NAD Director on the issue of whether the final agency determination is a matter of general applicability. Appellant claims the Deputy Director's appealability decision settled the issue of whether FAD-059 is a matter of general applicability, and that the ruling also settles the issue of jurisdiction of a NAD hearing officer. I conclude the appealability determination does not preclude inquiry into NAD's jurisdiction.

The pertinent regulations address appealability in two contexts. Seven C.F.R. § 11.6 deals with appealability of decisions found by an agency to be not appealable. An appealability determination of this

nature is made on the limited information given by the requesting party without agency response. The appealability determination of the Deputy Director seems to have been made in that context. On the other hand, the RMA regulation at 7 C.F.R. § 400.768(g) states that the only appeal from a FAD is a request for a final determination by the NAD Director on the issue whether the FAD is a matter of general applicability. That determination must be obtained before Appellant can obtain judicial review. That is the type of request made by Appellant, and it was not addressed by the Section 11.6 appealability determination.

The appealability determination of November 27, 2006 does not make a final determination on the issue of whether FAD-059 is a matter of general applicability. The conclusory finding in the appealability determination is: "The Agency decision is appealable because it is adverse to you as an individual participant." This is not a determination that FAD-059 is a decision of general applicability. Therefore, I conclude that the question remains whether a NAD hearing officer has jurisdiction to review the interpretations rendered by RMA in FAD-059, and that the appealability determination does not preclude jurisdictional inquiry.

Does a NAD hearing officer have jurisdiction to determine the correctness of RMA's interpretation of the Common Crop Policy and Loss Adjustment Standards?

RMA argues a NAD Hearing officer has no authority to review its interpretation of regulations and rules rendered in FAD-059. Appellant, on the other hand, disputes RMA's interpretations and argues that RMA's issuance of a FAD is not totally exempt from challenge – that applicable laws must provide some cheeks and balances.

Section 1506(r) of the Act specifies that RMA shall render the final agency determination regarding interpretation of the Act or regulations promulgated pursuant to the Act. RMA regulations were enacted to carry out that mandate, and one of those regulations, 7 C.F.R. § 400.768(g), provides that a FAD is not appealable to NAD, except for the limited appeal to the NAD Director regarding general applicability.

The NAD regulation at 7 C.F.R. § 11.6(a)(2) also acknowledges that matters of general applicability are not appealable to NAD. In addition, the circumstance of an RMA advisory interpretation of crop insurance rules does not clearly fall into the category of cases appealable to NAD. NAD appeals are afforded to a "participant" who has been given an adverse decision. A participant is defined as "an individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of an

agency to which the regulations in this part apply is affected by a decision of such agency." *See*, 7 C.F.R., § 11.1. In this case, the interpretation by RMA does not deny Appellant any right to participate in an agency program, or deny or limit any program benefit. The rejection of Appellant's proposed interpretation of the Policy and Loss Adjustment Standards might ultimately have adverse consequences in mediation or arbitration, but it does not immediately impinge on Appellant's rights. More importantly, if RMA's interpretation is, indeed, a decision of general applicability, the FAD will apply even-handedly to all producers and insurers with legal rights under the Policy.

I conclude that the only appeal of an RMA FAD provided for by applicable law is the limited appeal to the NAD Director on the issue of general applicability. A Director's determination on that issue has not been rendered. Therefore, I conclude that I, as a NAD hearing officer have no jurisdiction to review the interpretation of regulations and rules rendered in FAD-059.

Is this an appeal from a "procedure" which is allowed under Section 457.8(b)(20)(a)(1)(iv) of the Policy?

Appellant argues that a NAD hearing officer has jurisdiction because the Policy at 7 C.F.R., Section 457.8(b)(20)(a)(1)(iv) states that a FAD interpretation by RMA of *a procedure* may be appealed to NAD.

RMA acknowledges that the section does allow a NAD appeal regarding procedures, but contends Appellant is not contesting a procedure but interpretations of the Policy and the Loss Adjustment Standards, RMA argues the applicable section of the Policy is Section 457.8(b)(20)(a)(1)(iii), which mirrors 7 C.F.R. § 400.768(g) when it states an RMA interpretation of *a policy provision* is considered a rule of general applicability, and is not appealable to NAD except for the limited Director review on general applicability

Appellant's contention in the first appeal and in this appeal is that the insurance loss adjuster incorrectly interpreted provisions of the Policy and the Loss Adjustment Standards. I, therefore, conclude that Appellant's appeal does address policy provisions, and, that Policy Section 457.8(b)(20)(a)(1)(iii) applies. Under that section Appellant does not have a right of direct appeal to NAD. My conclusion is bolstered by the dictates of the Act. Section 1506(r) of the Act states that RMA will provide the *final* agency determination in response to an inquiry regarding interpretation of the Act or regulations issued under the Act. The law vests RMA with authority to render the final interpretation of rules enacted pursuant to the Act. The issuance of a FAD would hardly be a final determination by RMA if it were directly appealable to NAD wider Policy Section 457.8(b)(20)(a)(1)(iv).

Can FAD-059 be appealed to NAD because it was not timely issued?

Appellant argues that a NAD Hearing Officer has jurisdiction to hear an appeal of FAD-059 because the FAD was not timely issued. However, I note that the Director's Determination of September 15, 2006 rejected Appellant's argument that RMA's response to its FAD request was untimely. FAD-059 was issued on September 21, 2006, only six days after the Director's Determination. Thereafter, the Director denied Appellant's request for reconsideration. Under those circumstances, I conclude the Director's Determination resolved the issue of the timeliness of FAD-059.

Does FAD-059 constitute a decision of general application?

This addresses a question outside the scope of my authority as a NAD Hearing officer. As I have discussed, the single appeal provided by pertinent laws is a Director review on the issue of whether the FAD is a decision of general applicability. I have no authority to make such a decision. Appellant may request a Director review of that issue by pursuing a Director appeal from this Jurisdictional Determination.

DETERMINATION

My review of the facts and pertinent law regarding this controversy leads me to conclude that I, as a NAD Hearing Officer, do not have jurisdiction to hear this appeal.

This is a final determination of the Department of Agriculture unless a party files a timely request for review.

Dated and mailed February 1, 2007.

/s/ Ronald Stubblefield
RONALD STUBBLEFIELD
Hearing Officer
National Appeals Division

Attachments:

Notice of Right to Request
Director Review Request
for Director Review

Distribution of copies:

APPELLANT:
Weldon Lackey
5900 E. Avenue D
Lovington, NM 88260

APPELLANT'S REPRESENTATIVE:
Jeff Todd
McAfee & Taft
10th Floor, Two Leadership Square
211 North Robinson
Oklahoma City, OK 73102-7103

AGENCY ADMINISTRATOR
Copy of this DETERMINATION provided
to the Agency by the Western Regional Office,
via Federal Express to:

Risk Management Agency
c/o Appeals, Litigation and Legal Liaison Staff
1400 Independence Avenue, SW
Rm. 4619, South Building, AG Stop 0806
Washington, D.C. 20250

NOTICE OF RIGHT TO REQUEST DIRECTOR REVIEW AND/OR COPY OF RECORDING

DIRECTOR REVIEW REQUEST

Either party may request that the Director of the National Appeals Division review this determination. A suggested format is attached, but any request is acceptable if it has all the information in the "Instructions for Request for Review" listed below.

An Appellant who believes that this determination is wrong must file its request for Director review within 30 days of receipt of this determination. The Director presumes that it usually takes 7 days for a determination to reach an appellant by mail. However, the Director will accept requests filed more than 30 days from the date of the receipt of the determination if the person shows that receipt took longer than usual. A request must be in writing and be signed by Appellant. A request must also follow the "Instructions for Request for Review" listed below.

The Agency may also file a request for Director review if it believes this determination is wrong. The Agency must file its request within 15 business days of receipt of this determination. The head of the Agency or someone acting in that capacity must sign the request. The Agency must also follow the "Instructions for Request for Review" listed below.

Parties may file written responses to a request for Director review within 5 business days of receipt of a copy of the request for review. Responses should be sent to the address listed below, and a copy of the response must be sent to the other party.

The date a document is considered "filed" is either the date it is delivered in writing to NAD, its postmark date, or the date that a complete facsimile copy is received by NAD.

Instructions for Requests for Review

A request for review must:

1. be personally signed by Appellant/ Agency Head and dated.
2. specifically request a review.
3. give the case number for the Hearing Officer determination. (The case number is on the top right-hand side of the first page of the determination.)
4. note the date the requester received the Hearing Officer determination.

5. say why the determination is wrong.
6. confirm that the requester has also sent a copy of the request and additional information, if any, to the other party at the same time that the request was sent to NAD.
7. be mailed, faxed or delivered by commercial delivery service to:

Mailing Address:

National Appeals Division
755 Parfet Street, Suite 494
Lakewood, CO 80215

Fax Number: 303-236-2820
Phone Number: 1-800-541-0483
TDD Number: 1-800-497-0253

NAD Website: www.nad.usda.gov

COPY OF RECORDING REQUEST

The Appellant(s) and the Agency may obtain a copy of the audio recording made of the prehearing proceeding(s) at no cost. The Appellant(s) and/or the Agency may obtain the copies by making a written request to the NAD Regional Office.

REQUEST FOR DIRECTOR REVIEW

I/We, (print name(s)) _____ am/are the appellant(s)/agency head in the above-referenced appeal and I/we request a Director review of the appeal determination.

The case number is _____.

The appeal determination was received on _____.

The specific reasons why I/we believe the appeal determination is wrong are: (You may attach additional sheets and documents, if desired.)

A copy of this request and any attachments was mailed to the other parties on _____.

I/We swear that all statements in this filing are true to the best of my/our knowledge and belief.

_____ _____

(Appellant(s)/Agency
head signature)

USDA

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

DIRECTOR REVIEW DETERMINATION

In the Matter of

WELDON LACKEY	)	Case No.
	)	2006W000331
and	)	
RISK MANAGEMENT AGENCY	)	

On May 19, 2006, Weldon Lackey (Appellant) filed a request for a Director Review of a National Appeals Division (NAD) Hearing Officer Determination issued on April. 19, 2006. In the determination, the Hearing Officer reversed an adverse decision by the Risk Management Agency (RMA) dated October 17, 2005. In the adverse decision, RMA determined that Appellant's requests to RMA in letters dated July 10 and October 5, 2005 did not qualify as requests for a final agency determination (FAD) because Appellant was disputing a factual determination with his insurer rather than RMA's interpretation of policy or procedure under the Federal Crop Insurance Act (FCIA) and its regulations. Appellant has asked for Director review, despite receiving a favorable Hearing Officer determination, because he believes that RMA is misinterpreting that determination. (RMA has indicated

that it is in the process of issuing a FAD.) Appellant also seeks equitable relief.

I uphold the Hearing Officer's determination that RMA's adverse decision was not consistent with the applicable laws and regulations and was not supported by substantial evidence of record. I also conclude RMA's interpretation of that determination – that it is now required to issue a FAD – is correct. I lack authority to grant equitable relief in this case, and I therefore dismiss Appellant's request for such. I base my conclusions on a review of the case record (CR), including the Hearing Officer's determination, the hearing testimony, Appellant's request for review, and RMA's response brief.

Issues in This Case

The dispute to be resolved in this case is whether RMA's interpretation of the Hearing Officer determination as requiring it to issue a FAD is correct. To resolve this dispute, I must answer the following questions:

1) Did the RMA decision that was found to be erroneous respond to Appellant's request for a FAD within the timeframe required by applicable regulations?

2) If so, what is the status of Appellant's request once RMA's decision is found to be erroneous?

3) Does NAD have equitable relief in this type of case?

Legal Standards

The implementing regulations are found in Parts II and 400, Subpart X of Title 7 of the Code of Federal Regulations (C.F.R,). Section 7996 of the United States Code (U.S.C.) is also applicable. A participant in the Federal crop insurance program may request a FAD. 7 C.F.R. § 400.767. In the request, the participant may seek interpretation of the Federal Crop Insurance Act (FCIA) and the regulations promulgated under it that are in effect for the crop year in which the request is being made. 7 C.F.R. § 400.765(b). The participant is required to provide certain information in his request. 7 C.F.R. § 400.767(a)(1)-(5), Among that information, he must identify and quote the specific provisions in the Act or regulations for which he requests a final agency determination, and provide his detailed interpretation of the regulation. 7 C.F.R, § 400.767(a)(3) and (a)(5).

FCIC is required to provide a final determination of the interpretation to a request that meets all the conditions in section 400.767 in writing within 90 days of the date of its receipt of the request. 7 C.F.R. § 400.768(c). If FCIC does not issue a FAD within 90 days, the requestor may assume the interpretation he provided is correct for the applicable crop year. 7 C.F.R. § 400.768(e). If, however, in the sole judgment of the Federal Crop Insurance Corporation (FCIC), the participant's request is unclear, ambiguous, or incomplete, FCIC will not provide an interpretation, but will notify the requester that the request is

unclear, ambiguous or incomplete, within 30 days of such request. 7 C.F.R. § 400.768(b). If FCIC notifies a requestor that the request is unclear, ambiguous or incomplete under section 400.768(b), the time for FCIC to respond to the request will be tolled from the date FCIC notified the requester until the date FCIC receives a clear, complete, and unambiguous request. 7 C.F.R. § 400.768(d).

"Adverse decision" means an administrative, decision made by an officer, employee, or committee of any agency that is adverse to a participant. The term includes the failure of any agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. 7 C.F.R. § 11.1. The head of an agency may request Director review within 15 days after receiving the Hearing Officer's determination. 7 C.F.R. § 11.9(a)(2). The Director will consider a parties' contentions in its response brief in reviewing the determination. 7 C.F.R. § 11.9(d)(1).

The NAD Director has the same authority as any agency to grant equitable relief, 7 C.F.R. § 11.9(e). Equitable relief is available for a covered program. 7 U.S.C. § 7996(b). A "covered program" does not include the crop insurance program carried out under the FCIA, 7 U.S.C. § 7996(a)(2)(B).

Appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence. 7 C.F.R. § 11.8(e).

Background

I have reviewed the findings of fact (FOFs) contained in the Hearing Officer's determination and find that with the exception of the Hearing Officer's statement in FOF 6 that "RMA did not respond," they are supported by substantial evidence in the record. As will be discussed below, I note that the Hearing Officer erroneously found in FOF 6 that RMA did not respond to Appellant's July 10, 2005 request for a FAD until October 17, 2005 (*i.e.*, the date it issued the adverse decision), when in fact RMA responded in a letter dated September 30, 2005. Except for the Hearing Officer's erroneous finding in FOF 6, I adopt the FOFs as my own. The following is a summary of the relevant findings.

In April, 2005, Appellant bought a multi-peril crop insurance policy (Policy) for his 2005 cotton crop from ARMtech Insurance Services, Inc. (Insurer), The FCIC is the reinsurer on the Policy. (FOF 1; File 2, Tab 16, Pages 1-38, 6.) Section 20(a)(1) of the Policy provides that disputes involving determinations by Insurer are subject to mediation and arbitration, but "if a dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy

provision or procedure, . . . " the insured must obtain an interpretation from FCIC in accordance with section 400, subpart X. (File 2, Tab 16, App.'s Ex. A, Page 28.)

In evaluating a claim under the Policy, Insurer applies the FCIC AUL (American Upland Cotton) and ELS (Extra Long Staple) Cotton Loss Adjustment Standards (CLAS). (File 2, Tab 15, Page 78-206.) CLAS provides that damage to cotton should be appraised by using one row or separate rows of 100 foot samples and measuring the skips between "live" plants. (File 2, Tab 15, Page 103). CLAS defines "live" plants as plants that are capable of recovery and can timely contribute lint cotton to the ultimate yield at the time of harvest. (File 2, Tab 15, Page 103.)

In June, 2005, Appellant sustained two kinds of damage to his crop from disease and hail. (FOF 2 and 3; File 2, Tab 16, App.'s Ex. E, Page 1 and Ex. N.) On June 7, 2005, Appellant reported both kinds of crop damage to his insurance agent. Insurer sent an adjuster to Appellant's farm but the adjuster informed Appellant that according to CLAS, Insurer could only adjust for hail. (FOF 5, App.'s Hearing Testimony, Track 33:08.) Part of the dispute concerned whether in assessing the amount of damage to the cotton plants, the adjuster should include the "five" diseased plants, which Appellant contended were not capable of recovery, in the plant count. (*See* File 2, Tab 5, Pages 77, 103; App.'s Testimony, Tract 36:37.) Appellant wanted immediate acknowledgement of his crop loss due to disease so he would not

be compelled to invest additional money through the time of harvest, *i.e.*, either through the end of October or on into the winter, on plants that were not going to recover. (App.'s Testimony, 28:05-30:03, 30:53.) Appellant contacted two officials with Insurer, the claims executive and the claims adjustment supervisor, to challenge the adjuster's interpretation of the policy that there was no separate adjustment for diseased plants but they agreed with the adjuster's interpretation. (FOF 5, App.'s Testimony, Track 34.) Appellant also contacted the RMA Executive in Oklahoma City, and he agreed with the adjuster's interpretation. (FOF 5, App.'s Hearing Testimony, Track 34:22.)

In a letter to RMA dated July 10, 2005, Appellant requested a "Determination of Failure to Comply With Policies and Procedures of Federal Crop Insurance Handbook." (File 2, Tab 16, App.'s Ex. E.) Appellant referenced his Policy number, and page 16 of CLAS which contains Section 20(a)(1). (File 2, Tab 16, App.'s Ex. A, Page 28.) Appellant stated that he thought the adjuster had counted his plants incorrectly, and RMA should provide a separate adjustment for diseased plants under CLAS. (File 2, Tab 16, App.'s Ex. E, Page 2.) Appellant stated that his diseased plants were not going to recover by harvest time, and they had a compromised ability to contribute lint to the ultimate crop yield. (File 2, Tab 15, Page 103; Tab 16, App.'s Ex. E, Page 2.) Appellant ended his letter, stating "[p]lease define policy and procedure in this matter." (File 2, Tab 16, App.'s Ex. E, Page 3.)

In a letter dated September 30, 2005, the RMA Deputy Administrator for Compliance responded to Appellant's request. He referred to a telephone conversation with Appellant on July 25, 2005, in which he acknowledged Appellant's policy citation, apparently referring to Section 20(a). In the letter, he explained that Appellant's request dealt with a dispute between him and his insurer and that RMA did not handle such matters. (File 2, Tab 16, App.'s Ex. F.) Rather, he stated that RMA provided policy or procedural interpretations which may be obtained pursuant to section 400, subpart X of the regulations,

In an e-mail to RMA dated October 5, 2005, Appellant specifically requested a FAD, again referring to page 16 of CLAS, and resubmitted his July 10, 2005 request. (File 2, Tab 16, App.'s Ex. G.)

RMA issued the adverse decision on October 17, 2005, stating that neither Appellant's July 10 nor his October 5, 2005 letters qualified as a request for a FAD, (File 1, Tab 1,) RMA reiterated that Appellant's request involved a factual dispute between him and Insurer regarding whether the loss adjuster properly identified "live" plants, and RMA is only authorized to issue a FAD to interpret the FCIA and its regulations. RMA advised Appellant that he could request arbitration to resolve the dispute, and could seek judicial review in a United States district court once arbitration was completed. On December 28, 2005, Appellant appealed to NAD. (File 1, Tab 2, Fourth and Fifth Pages.)

In the Appeal Determination, the Hearing Officer reversed RMA's decision. (File 1, Tab 7.) (File 1, Tab 5.) The Hearing Officer found that in requesting an interpretation of CLAS, which were enacted under the authority of the FCIA, Appellant was in effect requesting an interpretation of the FCIA and its regulations, and therefore his request was proper subject matter for a FAD. The Hearing Officer found that RMA erroneously characterized. Appellant's request for a FAD as addressing a factual dispute between Appellant and the Insurer. (File 1, Tab 5, Page 6.) The Hearing Officer noted that Appellant's original request for a FAD (apparently referring to the July 10, 2005 letter) was unclear, and RMA did not, as required by regulations, notify Appellant within 30 days of receipt of his request, of the defects in the request. The Hearing Officer concluded that RMA erred in refusing to issue a FAD. (File 1, Tab 5, Page 6.)

Subsequent to the Appeal Determination, in a letter to Appellant's attorney dated May 10, 2006, RMA stated that the 90 day time period for it to respond to Appellant's request set forth in section 400.768(e) was not applicable because Appellant did not provide his interpretation of the relevant policy provisions in his request for a FAD. (File 1, Tab 8, Sixth Page.) RMA stated that it would give Appellant 10 days to amend his request by providing citations to the relevant policy provisions and his interpretation of them; otherwise, it would issue its interpretation by July

10, 2006. (Neither party has informed NAD if RMA has in fact issued its FAD yet.)

Analysis

Upon review, Appellant contends that because he requested a FAD on July 10, 2005, and RMA did not issue a FAD or a notice requesting clarification of the request within 90 days of its receipt of the request, he is entitled under section 400.768(e) to have his interpretation of the policy provisions deemed correct for the applicable crop year. (File 1, Tab 8, Page 2.) Thus, Appellant contends RMA may not now issue a FAD on this issue for that crop year. Appellant also requests equitable relief, claiming the Director "has the authority to apply basic principles of fairness" in this case. (File 1, Tab 8, Page 3.)

In its response, RMA contends that Hearing Officer erred in finding that NAD has jurisdiction over the merits of the claim because Insurer, not RMA, determined Appellant's crop loss, and therefore RMA did not issue an adverse decision. (File 1, Tab 9.) RMA also contends that contrary to the Hearing Officer's finding that RMA. "did not respond" to Appellant's July 10, 2005 request for a FAD, RMA responded within 90 days. RMA is apparently referring to its September 10, 2005 letter, and the October 17, 2005 adverse decision, in which it stated that Appellant's July 10 request involved a factual dispute between Appellant and Insurer and did not qualify for a FAD. RMA states that because it did not perceive that

Appellant's request qualified for a FAD, it did not notify Appellant within 30 days under section 400.768(b) that there were defects in the request. RMA contends that the Hearing Officer's subsequent determination that Appellant's request qualified for a FAD does not change the fact that RMA complied with its obligation to respond within 90 days under section 400.768(c). (File 1, Tab 6, Page 8.) RMA contends that the effect of the Hearing Officer's determination is that the ambiguity of Appellant's request has been clarified, so that RMA must now treat it as a request for an interpretation of the loss adjustment procedures and issue a FAD, which it is in the process of doing. Further, RMA states that the Director has no authority to grant equitable relief inasmuch as RMA lacks authority to grant equitable relief (File 1, Tab 9, Page 9.)

In its reply to RDA's response, Appellant contends RMA is precluded from challenging NAD's jurisdiction in its response brief because it did not challenge the Appeal Determination with the 15 day period required by the regulations. *See* 7 C.F.R. § 11.9(a)(2). (File 1, Tab 8, Page 1.)

A. Jurisdiction

Contrary to Appellant's contention, even though RMA did not request Director Review within the 15 day period set forth in section 11.9(a)(2), the Director may address RMA's contention in its response brief challenging NAD's jurisdiction. *See* 7 C.F.R. § 11.9(d)(1).

Because jurisdiction is always an important issue, I exercise my discretion to address that contention.

RMA's contention that the issue raised by Appellant is actually a dispute between it and its Insurer, so that NAD does not have jurisdiction, is without merit. RMA's refusal to issue a FAD in its October 17, 2005 letter, in response to a request made directly to RMA to issue a FAD under its regulations, is adverse to Appellant. Therefore, the October 17 letter constitutes an adverse decision. *See* 7 C.F.R. § 11.1. NAD certainly has jurisdiction in this case, and I will next review the merits of the review request.

B. Timeliness of RMA's Response to Appellant's Request for a FAD

In his July 10, 2005 letter, Appellant explained that he thought the adjuster had counted his plants incorrectly, and a separate adjustment should be made for diseased plants. Although in his letter Appellant did not specifically state be was requesting a FAD, he referred to page 16 of CLAS, which contains Section 20(a) and thereby indicates he was requesting a FAD. *See* File 2, Tab 15, Page 28. Despite finding that Appellant's request was unclear (File 1, Tab 7, Page 5), the Hearing Officer characterized the July 10 letter as a request for a FAD. Contrary to the Hearing Officer's finding in FOF 6 that RMA did not respond to the request, in its letter dated September 30, 2005, RMA acknowledged Appellant's request for a FAD but stated the subject, which it perceived as a factual

matter between Appellant and the Insured, did not qualify for a FAD. In an e-mail dated October 5, 2005, Appellant specifically requested a FAD, and again referenced page 16 of CLAS. RMA responded a second time with the issuance of the October 17, 2005 adverse decision, in which it refused to issue a FAD for the same reason, that the issue did not qualify for a FAD.

In this case, RMA responded to Appellant's request for a FAD within 90 days. RMA first responded to Appellant's July 10, 2005 letter requested a FAD on September 5, 2005. In its letter, RMA informed Appellant that the nature of the dispute did not qualify for a FAD. In responding to Appellant's request in that manner, RMA complied with its obligation under the regulations to respond within 90 days. Further, when Appellant reiterated his request for a FAD in his October 5, 2005 letter, RMA responded on October 17, 2005, with the issuance of an adverse decision. Similarly, in the adverse decision, RMA reiterated its position that Appellant's request did not qualify for a FAD. Again, this met BMA's obligation under section 400.768(c) to respond to a request for a FAD within 90 days.

Appellant's contention that the 90 days expired because RMA neither issued him a notice stating his request was unclear, ambiguous or incomplete nor issued him a FAD within 90 days of his July 10, 2005 request is also without merit. As noted above, RMA met its obligation to respond to the Appellant's FAD requests with its letter dated September 30, 2005,

and the October 17, 2005 adverse decision. Thus, there is no basis for my holding, as Appellant urges, that his interpretation of the insurance Policy is correct.

The Hearing Officer's determination that RMA's response was erroneous, because it misinterpreted Appellant's request, means that RMA is now obliged to issue a new response to Appellant's request for a FAD. The 90-day period for RMA to respond to a request begins from the date it receives a clear, complete, and unambiguous request 7 C.F.R. § 400.768(d). I reiterate that RMA has indicated that it is in the process of issuing a FAD in accordance with the Hearing Officer's Appeal Determination. If that new response is adverse to Appellant, he may appeal it pursuant to the applicable regulations.

C. Equitable Relief

The NAD Director has the same authority as any agency to grant equitable relief. 7 C.F.R. § 11.9(e). However, in this case, I do not have authority to grant equitable relief. Equitable relief is only available for a covered program, and a "covered program" does not include the crop insurance program carried out under the FCIA. 7 U.S.C. § 7996(a)(2)(B).

Conclusion

Based on the discussion above, I uphold the Hearing Officer's determination. After reviewing the applicable regulations and relevant facts in this case, I conclude that Appellant has shown by a preponderance of the evidence that RMA's decision was erroneous, but has not shown that he is entitled to additional relief. *See* 7 C.F.R. § 11.8(c).

/s/ M. Terry Johnson — 9/15/06

M. Terry Johnson — DATE

Deputy Director

UNITED STATES
DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the Matter of WELDON LACKEY and RISK MANAGEMENT AGENCY	)))))))	Case No. 2006W000331

APPEAL DETERMINATION

Weldon Lackey, Appellant, appeals an adverse decision of the Risk Management Agency (RMA) dated October 17, 2005. In that decision, RMA denied Appellant's request for a final agency determination (FAD) made pursuant to Title 7, Code of Federal Regulations (C.F.R.), Part 400, Subpart X. RMA claimed Appellant's request was not proper because it did not deal with interpretation of a provision of the Federal Crop Insurance Act (the Act) or with any regulation issued in accordance with the Act.

Based on the appeal record, the regulations applicable to this specific controversy, and the analysis and rationale that follow, I conclude that RMA did err in its decision.

BACKGROUND INFORMATION

Appellant is a cotton farmer in eastern New Mexico. He obtained a multi-peril crop insurance policy for his 2005 crop. Under provisions of the Act, 7 C.F.R. § 1501 et.seq., the policy is reinsured by the Federal Crop Insurance Corporation (FCIC). The provisions and terms of the Policy are entirely specified by 7 C.F.R. § 457.8.

Appellant suffered two injuries to his crop, from disease and hail. He disagreed with the contention of his insurance adjuster that he could not receive a separate loss adjustment for disease. The adjuster also pulled up various plants that he deemed not viable, and Appellant objected, believing those plants were diseased and that a separate adjustment should be made for their loss. Appellant worked his way up the chain of command of the insurance/adjusting company, but received the same response in each instance – that no separate adjustment could be made for disease. Finally, an RMA official in Oklahoma City agreed with the insurance company employees.

Appellant wanted to mediate the dispute, but concluded that the terms of the Policy required that he first request a FAD from RMA. The Policy and the provisions of 7 C.F.R., Part 400, subpart X, require that RMA (on behalf of FCIC) give interpretations of statutory and regulatory provisions that are the basis of a dispute between the parties to a federal crop insurance policy. Appellant wrote a letter to RMA

requesting a FAD, and a follow-up e-mail, By letter of October 17, 2005, RMA denied Appellant's request, claiming he had not stated a valid basis for a FAD request.

Appellant filed this appeal on December 28, 2005. The RMA adverse decision letter of October 17, 2005, did not include the required appeal rights statement advising Appellant of his right to appeal to NAD. The letter did not inform Appellant that he must request a NAD appeal within 30 days of receipt of the agency's adverse decision. Because RMA did not advise Appellant of these rights, Appellant's request is considered timely under NAD regulations.

At Appellant's request, a hearing was held March 22, 2006 at a NAD-designated hearing site in Oklahoma City, Oklahoma, the city where Appellant's Counsel practices law. Appellant and his Counsel appeared in person. The RMA Representative and two RMA witnesses appeared by telephone. At the conclusion of the hearing I closed the appeal record.

STATEMENT OF THE ISSUES

National Appeals Division (NAD) jurisdiction is an issue in this appeal. Soon after Appellant brought this appeal, the Assistant Director for the NAD Western Region ruled that NAD had no jurisdiction in this matter. However, the Assistant Director later rescinded that decision and the appeal was assigned to this hearing officer. A prehearing conference was scheduled, with the notice stating that jurisdiction of

NAD would be an issue. RMA did not appear at the prehearing conference. That failure turned out to be excusable, since mail-screening procedures delayed delivery of the notice, and RMA did not receive it in time. Because RMA did not appear, the prehearing conference was held without resolution of the jurisdiction question.

At the hearing, the Agency Representative stated that RMA did not believe NAD had jurisdiction in this controversy, but he gave no argument or citation of authority in support of that position. Nonetheless, jurisdiction of this NAD hearing officer remains an issue and must be addressed. Only if jurisdiction is found can the other two issues of the appeal be addressed. Those issues are whether Appellant's request to RMA for a FAD deals with matters appropriate for a FAD; and whether RMA acted correctly in its outright rejection of the request, based on characterization of the conflict as a factual dispute between Appellant and his insurer.

To address these issues, I must answer the following, more specific, questions: (1) Does a NAD hearing officer have jurisdiction to hear this dispute over RMA's refusal to issue a FAD? (2) Did Appellant's request for a FAD address an interpretation of a provision of the Federal Crop Insurance Act, or a regulation enacted under authority of the Act; and, (3) Did RMA correctly depict Appellant's request as a dispute of fact between Appellant and his insurer?

FINDINGS OF FACT

1. Appellant is an agricultural producer who exclusively farms cotton on his 700-acre farm in Lea County, New Mexico. In April 2005, Appellant bought multi-peril crop insurance policy for his 2005 cotton crop from America Agri-Business Insurance Company. The Federal Crop Insurance Corporation is the reinsurer on the policy. (Appellant's Exhibit 1, pgs 1-3)

2. Around the first week of June, 2005 Appellant noticed what he believed to be disease damage, including plant death, to his growing crop. (Testimony of Appellant, Hearing Audio, Tr. 1, 31:30). He collected samples of the diseased plants and submitted them to a plant pathologist at the New Mexico State University. The resulting report stated that samples showed a fungal infestation called *verticillium wilt*, with no recommendation of any effective treatment, but with the suggestion that Appellant plant a variety of cotton plant resistant to the fungus in the future. (Appellant's Exhibit 4, pgs 1-4).

3. Around June 7, 2005, a major hailstorm further damaged Appellant's growing cotton crop. (Testimony of Appellant, Hearing Audio, Tr. 1, 31:57).

4. Appellant reported both damaging events to his insurance agent on June 7, 2005. An adjuster was sent to Appellant's farm. The adjuster began following procedures set out in the FCIC-approved Cotton Loss Adjustment Standards for determining loss from the hail, but claimed he could not separately adjust for disease loss or damage. The adjuster began pulling up plants

he deemed non-viable, and Appellant objected, claiming those plants were diseased and that there should be an adjustment for their loss. (Testimony of Appellant, Hearing Audio, Tr. 1, 32:58).

5. Appellant disputed the adjuster's contention, and went up the chain of authority of the insuring company, trying to get an adjustment for his disease loss. The insurance company representatives all told Appellant they could not adjust for disease, except to take all green plants to harvest and then determine loss of production. An RMA official from the Oklahoma City office also accepted the adjuster's interpretation of the Policy and the FCIC Adjustment Standards. (Testimony of Appellant, Hearing Audio, Tr. 1, 33:33-34:20).

6. On July 10, 2005, Appellant sent a letter to RMA requesting a FAD, Appellant claimed that a provision in the Adjustment Standards means that a separate adjustment could be made for plants killed by disease. RMA did not respond. Appellant sent an e-mail to RMA on October 5, 2005, again requesting a FAD. By letter of October 17, 2005, RMA finally responded to Appellant, stating that neither Appellant's letter nor e-mail qualified as a proper request for a FAD. (Agency Record [A.R.], pgs 23-24).

7. The adverse decision of RMA did not advise Appellant of his right to appeal to NAD, nor of the time in which he must bring the appeal. (A.R., pgs 23-24).

DISCUSSION

Seven Code of Federal Regulations (C.F.R.), Part 11, governs this appeal. Seven C.F.R. Parts 400 and 457 govern the particular issues in this case.

1. Does a NAD Hearing officer have jurisdiction to hear this dispute over RMA's refusal to issue a FAD? Yes.

Seven C.F.R., Part 400, lists some instances where a NAD appeal is *not* allowed in regard to an RMA decision. However, those instances do not apply to this particular case. Section 400.768(g) states that all FADs are considered matters of general applicability and not appealable to NAD. However, since there was not a FAD issued in this case, that section does not apply. Section 400.768(b) requires RMA to advise a requester if a request is unclear, ambiguous or incomplete, so the requester can file a proper request. Further, Section 400.768(b) states that the determination of whether a request is unclear, ambiguous, or incomplete is "in the sole judgment of (RMA)." Thus, it is not an appealable decision when RMA notifies a requester that a FAD request is insufficient. However, RMA did not give Appellant such a notification in this instance, so this section is also not applicable.

Other regulations acknowledge NAD jurisdiction. Seven C.F.R., Part 400, Subpart J deals with "Appeal Procedure" regarding the Federal Crop Insurance Act. Section 400.91, entitled "Applicability," states that NAD appeal procedures apply to adverse decisions made by RMA personnel concerning contracts

of insurance insured by FCIC. Section 400.92 states that, except for determinations of good farming practices, nothing in subpart J prohibits a participant from filing an appeal of an adverse decision directly with NAD under Part 11 of 7 C.F.R. Importantly, Part 11 gives NAD authority to hear appeals from an agency "adverse decision," and Section 11.1 defines adverse decision to include the failure of an agency to act within the specified time. Section 11.1 also defines "agency" to include RMA. In this instance, Appellant seeks review of the failure of RMA to act within the time specified to issue a FAD.

Seven C.F.R. Part 457, entitled "Common Crop Insurance Regulations," includes the Policy at Section 457.8. Section 457.8(20)(a)(1) of the Policy states that resolution of any dispute between the insured and the insurer involving a policy and procedure interpretation must be resolved by a FAD request to RMA. Section 457.8(20)(a)(1)(iv) of the Policy goes on to say that an interpretation by RMA of a procedure may be appealed to NAD in accordance with 7 C.F.R., Part 11.

Section 457.8(20)(a)(1)(iv), which provides for a NAD appeal of an interpretation by RMA, does seem in conflict with the previously discussed Section 400.768(g) (*FADs are matters of general applicability and not appealable to NAD*). However, Section 457.8(a) states that "if there is a conflict between the policy provisions published at 7 CFR, Part 457, and the administrative regulations published at 7 CFR, Part 400, the policy provisions published at 7 CFR Part 457

control." Thus, the provision in Part 457.8 that makes an RMA interpretation appealable to NAD, controls.

From review of the various appeal provisions in Parts 400 and 457, it is apparent the NAD appeal prohibitions do not apply, while the provisions granting a right of appeal do. Therefore, I conclude that I have jurisdiction to hear this appeal. I now turn to the specific issues of the appeal.

Did Appellant's request for a FAD address either an interpretation of any provision of the Federal Crop Insurance Act (7 C.F.R. 1501 et. seq.), or a regulation enacted under authority of the Act? Yes.

Seven C.F.R., Section 400.765(a) addresses procedures for obtaining a FAD for "interpretation of any part of the (Federal Crop Insurance) Act or the regulations promulgated thereunder." Seven C.F.R., Part 457 was unquestionably enacted under authority of the Act. Therefore, the Policy, which is set out in its entirety in Section 457.8, is part of the regulations enacted under the Act, and a FAD may be requested for interpretation of the terms of the Policy.

In addition, the provisions of the Policy seem to enlarge the scope of permissible FAD requests. Section 457.8(20)(a)(1) provides for RMA resolution of a dispute between the insured and the insurer involving "whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy or procedure . . . " The Policy requires that the parties to the insurance

contract resolve such disputes by mediation or arbitration, and makes the policy interpretation of RMA set out in a FAD binding in those dispute-resolution procedures.

Here the dispute also involves interpretation of a provision of the FCIC-approved "Cotton Loss Adjustment Standards." The Standards are mandated by FCIC for loss adjustment, and were used by the insurer in adjusting Appellant's crop. The Standards were enacted under authority of the Act, and interpretation of their terms by FAD request is also appropriate. Appellant believes a provision found at page 16 of the Standards, defining "live plants" as "plants that can timely contribute lint cotton to the ultimate yield at the time of harvest," can be interpreted as authorizing a separate adjustment for disease loss. The issue is not whether Appellant is right or wrong, but whether RMA has a duty to answer his request for an interpretation of provisions of the Policy and the Standards. Clearly, under the previously discussed regulations, RMA has that duty. The only exception, found in 7 C.F.R. § 400.768(a), is if Appellant's request deals with an interpretation of a specific factual dispute between Appellant and the insurer. RMA will not issue a FAD or otherwise get involved in a dispute of that nature. That brings the discussion to the last question to answer.

Did RMA correctly depict Appellant's request as a dispute of fact between Appellant and his insurer? No.

RMA attempts to characterize the appeal as addressing a factual dispute between Appellant and his insurer – whether the plants the adjuster plucked were or were not capable of adding to the lint at harvest. That is simply not the dispute framed by Appellant. He wants RMA to determine whether the language in the Policy and the Adjustment Standards allows for a separate adjustment for disease loss. He argues that the language of the Standards anticipates a separate adjustment for plants killed by disease. He also reasons that any other result is unfair, because it would in effect require him to pay a double "deductible" for a separate distinct loss. He bases this argument on the fact that under the terms of the Policy he agrees to accept a 60% maximum recovery for a major loss, and also must take the crop to harvest, using good agricultural practices. He claims this limitation and this requirement would be unfair unless the insurer adjusts for each separate cause of loss.

Admittedly, Appellant's original FAD request to RMA was unclear. However, Section 400.768(a) requires RMA, within 30 days of receipt of a request for a FAD, to notify the requester if the request is "unclear, ambiguous, or incomplete." Section 400.768(c) then provides that the requester has 90 days to amend the request to meet all RMA objections. Here, RMA did not give Appellant such a notice, and Appellant had no opportunity to clarify his request.

It bears repeating that it is not an issue in this appeal whether Appellant is right or wrong in his interpretation of the Policy and Adjustment Standards

language interpretation of that language is the duty of RMA, and not of a NAD hearing officer. The issue is whether RMA incorrectly characterized Appellant's request as a factual dispute between Appellant and his insurer, thereby avoiding the obligation to provide a FAD. I conclude there was an incorrect characterization by RMA. Appellant sought an interpretation of the language of the Policy and the FCIC Standards regarding separate loss adjustment for distinct causes of loss. It is a proper subject for a FAD request, and RMA erred in rejecting the request. (FOF 4, FOF 5, FOF 6).

DETERMINATION

An appellant bears the burden of proving by a preponderance of the evidence that an agency's decision is erroneous. [7 C.F.R. § 11.8(e)]. In this case, Appellant Weldon Lackey did meet that burden. The Risk Management Agency decision is erroneous.

Dated and mailed April 19, 2006.

/s/ Ronald Stubblefield
Ronald Stubblefield
Hearing Officer
National Appeals Division

Attachments:
Notice of Right to Request Director Review
Request for Director Review

United States Department of Agriculture
Risk Management Agency
1400 Independence Avenue, SW
Stop 0801
Washington, DC 20250-0801

USDA
[LOGO]

Mr. Weldon Lackey
5900 E Avenue D
Lovington, NM 88260

OCT 17 2005

Dear Mr. Lackey:

The Risk Management Agency (RMA) has received your e-mail message of October 5, 2005, which included a copy of your July 10, 2005, letter to RMA's Deputy Administrator of Compliance. Thank you for allowing RMA another opportunity to address your concerns and clarify policy and regulatory provisions.

Neither your letter of July 10 nor e-mail message of October 5 qualifies as a request for a final agency determination (FAD) under the regulations published at 7 C.F.R., Part 400, Subpart X. A FAD can only provide an interpretation of provisions of the Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*) (Act) or regulations issued under the authority of the Act. Since your request involves a dispute over whether the loss adjustor properly identified "live" plants, and not an interpretation of the Act or regulations issued there under, your request does not qualify for a FAD.

Your July 10 letter cites specific disagreements with your insurance provider concerning the determinations made during the stand reduction appraisal of

your cotton Specifically, you appear to question if the insurance provider could accurately determine the "live" plants that may ultimately contribute to the lint. You are not questioning the meaning of the procedure. Therefore, your request also does not qualify for an interpretation of procedures by RMA under the provisions of section 20 of your policy.

Options to resolve disagreements over appraisal amounts, contained in section 20 of your policy, were included in RMA's letter of September 30, which explained the stand reduction appraisal method. Briefly, you may seek mediation with your insurance provider. If resolution is not reached through mediation, or if you and your insurance provider do not agree to mediation, the dispute must be resolved through arbitration in accordance with the rules of the American Arbitration Association.

Section 20 also provides that regardless of whether mediation is elected, arbitration proceedings must occur within one year of the latter of, the date of the denial of your claim or the date your insurance provider issued the determination with which you disagree. You must complete arbitration before seeking judicial review in United States district court.

Only in a judicial review, you may request a determination from the Deputy Administrator of Compliance that the insurance provider, agent, or loss adjuster failed to comply with the terms of the policy or procedures issued by the Federal Crop Insurance Corporation (FCIC) and that failure caused you to receive a

payment less that to which you were entitled. Should you be in judicial review and obtain such a determination, you may recover attorneys fees, other expenses or other damages.

The issues contained in your July 10 letter must be resolved with your insurance provider. RMA has the authority to interpret FCIC-issued policies and procedures but cannot intercede in this dispute between you and your insurance provider.

Sincerely

/s/ William J. Murphy
William J. Murphy
Deputy Administrator
Insurance Services

cc: Mr. Ted Ethridge, President
ARMtech Insurance Services
7101 82nd Street
Lubbock, Texas 79424

October 5, 2005

Please be advised that I continue to request a final agency determination on this matter. In accordance with my Multi Peril Crop Insurance Policy, 20(a)(1) requires that "if the dispute in any way involves a policy or procedure interpretation . . . either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X . . . " FCIC received my July 10th request on July 18th. Contrary to Michael Hand's letter dated September 30, neither I nor my wife circumvented the request from reaching the appropriate FCIC personnel. My request was and still is addressed to "To Whom It May Concern" at "USDA/RMA/. . . .". Please see that it reaches the appropriate FCIC personnel. Furthermore, in accordance with 7 CFR Subpart X 400.768(c), please note the 90 day time frame ends October 18, 2005. The following is my original request as submitted previously. Please advise if there are errors, omissions or any other information needed to complete this matter timely.

July 10, 2005

USDA/RMA/Deputy Administrator of Compliance/
Stop 0806
1400 Independence Avenue, S.W.
Washington D.C. 20250-0806

Re: Request for Determination of Failure to Comply with Policies and Procedures of Federal Crop Insurance Handbook

Number: 25090 (12-2003)
25090-1 (11-2004)
Page 16 – 6. B. (2) (b) 2_

Insured:	Weldon Lackey 5900 E Ave D Lovington, NM 88260-9593 505-399-4440 plackey@pvtnetworks.net Policy #: 2005-NM-601-722626
Agency:	Whittenburg Insurance Agency 1409 Lubbock Hwy. Lamesa, TX 79331
Insurance Provider	ARMtech Insurance Services 7101 82nd Street Lubbock, TX 79424 Claims Adjuster – Byron Hill Supervisor of Claims Adjustment – Steve Fortenbury ARMtech Claims Executive – Buckles Bryant
RMA Executive	Sam Cameron Oklahoma City Oklahoma
Agricultural Expert	Dr. Natalie Goldberg, Extension Plant Pathologist NMSU Cooperative Extension Service SK N 234 Skeen Hall, NMSU Las Cruces, New Mexico 88003 505-646-1621

To Whom It May Concern:

On June 7, 2005, I called in a claim for disease and hail damage. I was systematically informed by Byron Hill, Steve Fortenbury, Buckles Bryant and finally Sam Cameron, that the Loss Adjustment Standards manual makes no provisions for disease adjustment and that all green plants would be taken to harvest in their entirety or to harvest in designated strips. Byron Hill marked off 100 feet for adjustment and proceeded to pull up green leafed cotton plants he did not consider "viable". I refused his adjustment on the basis that he could not differentiate diseased versus non-diseased plants visually. I requested a more qualified adjuster and Byron brought Steve Fortenbury to adjust. Steve began by informing me on the proper way to adjust. He immediately began pulling and discarding green leafed cotton plants he did not deem "viable". Again I questioned his ability to discern visually what he called viable green plants and again refused to accept his adjustment. I then contacted Buckles Bryant who informed me that all green plants will go to harvest in one or the other of the aforementioned forms. He further informed me the only way they would adjust disease was at harvest in the form of last production. I then had Agricultural Expert Dr. Natalie Goldburg email Sam Cameron the results that proved disease in my cotton that qualified as specific causes of loss. I informed Mr. Cameron that Dr. Goldburg's findings put my plants within the scope of his definition of live plants on page 16 of the Loss Adjustment Standards and ask

that they be adjusted within FCIC regulations. He refused, calling that part of the manual a "weak point in the regulations". He unequivocally stated that even one "green plant" within the 100 feet of representative test, regardless of presence of disease or regardless of the definition of a live plant on page 16, would have to go to harvest in one of the two forms previously mentioned.

Contrary to all statements by the above mentioned gentlemen, the definition of a "live" plant in the stand reduction method on page 16 of the Loss Adjustment Standards handbook, does not say that it is "any green plant". Furthermore, it does not authorize a claims adjustor or his supervisor to arbitrarily pull up and discard plants they deem "viable" and "not viable". The handbook does, however, make allowances for diseased plants in that diseased plants have a compromised ability to be "capable of recovery" and a compromised ability to "timely contribute lint . . . ". Correctly interpreting the meaning of a live plant with substantiated laboratory results by an Agricultural Expert should allow adjustment for diseased plants.

When there is Agricultural Expert evidence of disease throughout a unit, with or without a quantifiable amount, deference should be given to the expert opinion and therefore to the insured. Presently, deference is given to the claims adjustment process which causes an increased monetary risk on the producer. This opposes the producer's position of protection for which he bought the policy. The policy gives no right

to the insurance company to increase the risk of the cotton producer. As it stands now, when the insurance claims process does not defer to a producer holding evidence, he is in effect charging the producer two deductibles. The first deductible is the agreed upon APH reduction. (in my case 40%) The second deductible comes when the insured is required by the insurer to pay for the remaining maintenance and harvest of a crop that potentially has no more worth at harvest than it did on the day of the claim.

Coincidentally, their argument is the same as mine, except for the opposing resolutions. Their position is that no one, not even experts, can accurately predict yield of diseased plants, therefore they want to go to harvest for accurate yields. Ironically, I too believe that no one, not even experts, can accurately predict yield of diseased plants, therefore first, since I have proof of diseased plants that qualify for specific cause of loss, I should not have my risk increased by the additional farm operating costs from claim date forward. Second, since neither I, nor anyone else, can definitively know if diseased plants will fully recover for a normal yield, I should not have to be forced by RMA and ARMtech to take a chance on any unit with compromised plants for which I own disease insurance.

Please define policy and procedure in this matter.

Respectively requested,

Weldon Lackey

USDA
[LOGO]

United States Department of Agriculture
Risk Management Agency
Compliance
1400 Independence Avenue, SW Stop 0806
Washington, DC 20250-0860

September 30, 2005

Mr. Weldon Lackey
5900 E Avenue D
Lovington, NM 88260

Dear Mr. Lackey:

This office is in receipt of your letter requesting a review by this office of your current claim situation. As I informed you in a telephone conversation on July 25, 2005, the policy citation you were using to send your request to me does not apply to your current situation. I sent your letter to the Risk Management Services Division who handles unusual claim issues and questions, but you or your wife told the specialist in that division you wanted the letter to come to my office.

This appears to be a dispute between you and your insurance provider. The Risk Management Agency (RMA) does not normally get involved in such disputes because your policy provides a mechanism or handling of such matters and RMA does not want to interfere with this process. However, RMA is frequently asked to provide policy or procedure interpretations. There is a mechanism for requesting such

interpretations contained at 7 C.F.R. part 400, subpart X or 7 C.F.R. part 1, subpart K.

While it is the arbitrator's responsibility to determine whether the loss adjuster correctly adjusted your claim, following is a general description of the loss adjustment process applicable to the loss adjustment of immature cotton. You insurance provider is required to comply with such process. In accordance with the AUP and ELS Cotton Loss Adjustment Standards Handbook, when an immature crop is damaged due to an insurable cause of loss, the insurance provider is required to use a stand reduction method to determine the amount of potential production at the time of the inspection. The stand reduction method counts live plants within the sampled area to arrive at the potential production to count. Because the crop is immature, the procedures do not provide that the insurance provider can deviate from this established methodology to determine the crop's potential. However, loss adjusters must use their best judgment as to what constitutes a live plant. Once the adjustment is completed on an immature crop, producers generally have four options; 1) accept the appraisal and destroy the crop; 2) agree to leave representative strips in accordance with the insurance policy to be appraised later end destroy the remaining acreage; 3) carry the entire crop to harvest; or 4) dispute the appraisal as outlined in the policy.

If you believe that the loss adjuster did not properly follow these procedures, then you should proceed with

your arbitration. If you think there is an issue regarding the interpretation of policy or procedure, you can request such an interpretation from RMA.

Sincerely,

/s/ Michael Hand
Michael Hand
Deputy Administrator
for Compliance

July 10, 2005

USDA/RMA//Deputy Administrator of Compliance/
Stop 0806
1400 Independence Avenue. S.W.
Washington, D.C. 20250-0806

Re: Request for Determination of Failure to
Comply with Policies and Procedures of
Federal Crop Insurance Handbook
Number: 25090 (12-2003)
25090-1 (11-2004)
Page 16 – 6. B. (2) (b) 2_

Insured:	Weldon Lackey 5900 E Ave D Lovington, NM 88260-9593 505-399-4440 plackey@pvtnetworks.net Policy #: 2005-NM-601-722626
Agency:	Whittenburg Insurance Agency 1409 Lubbock Hwy. Lamesa, TX 79331
Insurance Provider	ARMtech Insurance Services 7101 82nd Street Lubbock, TX 79424 Claims Adjuster – Byron Hill Supervisor of Claims Adjust ment – Steve Fortenbury ARMtech Claims Executive – Buckles Bryant
RMA Executive	Sam Cameron Oklahoma City Oklahoma

Agricultural Expert Dr. Natalie Goldburg
Extension Plant Pathologist
NMSU Cooperative Extension Service
SK N 234 Skeen Hall, NMSU
Las Cruces, New Mexico 88003
505-646-1621

To Whom It May Concern:

On June 7, 2005, I called in a claim for disease and hail damage. I was systematically informed by Byron Hill, Steve Fortenbury, Buckles Bryant and finally Sam Cameron, that the Loss Adjustment Standards manual makes no provisions for disease adjustment and that all green plants would be taken to harvest in their entirety or to harvest in designated strips. Byron Hill marked off 100 feet for adjustment and proceeded to pull up green leafed cotton plants he did not consider "viable." I refused his adjustment on the basis that he could not differentiate diseased versus non-diseased plants visually. I requested a more qualified adjuster and Byron brought Steve Fortenbury to adjust. Steve began by informing me on the proper way to adjust. He immediately began pulling and discarding green leafed cotton plants he did not deem "viable". Again I questioned his ability to discern visually what he called viable green plants and again refused to accept his adjustment. I then contacted Buckles Bryant who informed me that all green plants will go to harvest in one or the other of the afore mentioned forms. He further informed me the only way they would adjust disease was at harvest in the form of lost production. I then had

Agricultural Expert Dr. Natalie Goldburg email Sam Cameron the results that proved disease in my cotton that qualified as specific causes of loss. I informed Mr. Cameron that Dr. Goldburg's findings put my plants within the scope of his definition of live plants on page 16 of the Loss Adjustment Standards and ask that they be adjusted within FCIC regulations. He refused, calling that part of the manual a "weak point in the regulations". He unequivocally stated that even one "green plant" within the 100 feet of representative test, regardless of presence of disease or regardless of the definition of a live plant on page 16, would have to go to harvest in one of the two forms previously mentioned.

Contrary to all statements by the above mentioned gentlemen, the definition of a "live" plant in the stand reduction method on page 16 of the Loss Adjustment Standards handbook, does not say that it is "any green plant". Furthermore, it does not authorize a claims adjustor or his supervisor to arbitrarily pull up and discard plants they deem "viable" and not viable". The handbook does, however, make allowances for diseased plants in that diseased plants have a compromised ability to be "capable of recovery" and a compromised ability to "timely contribute lint . . . ". Correctly interpreting the meaning of a live plant with substantiated laboratory results by an Agricultural Expert should allow adjustment for diseased plants.

When there is Agricultural Expert evidence of disease throughout a unit, with or without a quantifiable amount, deference should be given to the expert opinion and therefore to the insured. Presently, deference is given to the claims adjustment process which causes an increased monetary risk on the producer. This opposes the producer's position of protection for which he bought the policy. The policy gives no right to the insurance company to increase the risk of the cotton producer. As it stands now, when the insurance claims process does not defer to a producer holding evidence, he is in effect charging the producer two deductibles. The first deductible is the agreed upon APH reduction. (in my case 40%) The second deductible comes when the insured is required by the insurer to pay for the remaining maintenance and harvest of a crop that potentially has no more worth at harvest than it did on the day of the claim.

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Please define policy and procedure in this matter.

Respectively requested,

/s/ Weldon Lackey
Weldon Lackey